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No. 10-

IN THE
Supreme Court of the United States

TROY BARBOUR,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a nonunanimous jury verdict.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy Barbour respectfully petitions for a writ of certiorari to the Louisiana First Circuit Court of Appeal in *State v. Barbour*, No. 2009-KA-1258.

OPINIONS BELOW

The judgment of the Louisiana First Circuit Court of Appeal (Pet. App. A) is reported at 35 So. 3d 1142 (La. App. 2010), and is reprinted at Pet. App. 1a. The Louisiana Supreme Court's order denying review of that decision (Pet. App. B) is unpublished and is reprinted at Pet. App. 23a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Fourth Circuit Court of Appeal was entered on March 24, 2010. The Louisiana Supreme Court denied review of this decision on November 19, 2010. Pet. App. 23a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 17(A) of Article I of the Louisiana Constitution provides in relevant part: "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict."

Article 782 of the Louisiana Code of Criminal Procedure provides, in pertinent part: "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."

STATEMENT OF THE CASE

This case raises an issue that goes to the heart of our Constitution's guarantee that individuals accused of a crime receive certain fundamental procedural protections: whether a jury may convict a defendant of a crime based on a less than unanimous jury verdict. Thirty-eight years ago, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court held in a 4-1-4 decision that the Sixth and Fourteenth Amendments do not prohibit States from securing criminal convictions in this manner. Subsequent legal developments and academic studies call this result into serious question.

1. In 2005, Donald Baker hired petitioner Troy Barbour to help him with a construction project. Both men had prior criminal convictions, but neither had any violent history. The two men often quarreled, in part because Baker often refused to pay petitioner in a timely manner.

In early 2006, petitioner went to see Baker at the project. Petitioner testified at trial that he did so because Baker had called and told him he could come collect several thousand dollars in past wages. Upon arriving, petitioner noticed that "Baker was under the influence of crack cocaine" because "Baker's eyes were bulging and he was breathing hard." Pet. App. 10a. Baker later denied being under the influence, even though a blood test taken later at the hospital found cocaine in his system. Pet. App. 3a.

The two men then had an altercation in which petitioner shot Baker several times. Baker was seriously injured but did not die. Immediately after the shooting, both men attempted to thwart the police's investigation. Petitioner evaded the police. Baker "lied" about owning a gun and claimed that someone besides petitioner had shot him. Pet. App. 17a. Eventually, petitioner testified that he had acted in self-defense, after Baker had pulled out a .44 Magnum and reached to take a shot at him. Pet. App. 9a. For his part, Baker claimed that petitioner had shot him without warning or provocation. Pet. App. 2a-3a. No physical evidence favored either story.

The State apparently believed Baker's version of events and charged petitioner in the Criminal District Court, Orleans Parish with attempted second degree murder. After a two-day "he said, she said" trial, the 12-person jury voted 10-2 to convict petitioner. While first-degree murder in Louisiana is a capital crime and requires a unanimous verdict to convict, second-degree murder is punishable only by life in prison and does not require unanimity to convict. The State in such a prosecution need only persuade ten of twelve jurors to vote guilty in order to secure a conviction. La. Const. art. I, § 17(A); La. C. Cr. P. Art. 782. Accordingly, over petitioner's objection that Louisiana's nonunanimity rule violates the Sixth and Fourteenth Amendments, Pet. App. 1a, the trial court entered judgment finding petitioner guilty as charged. The court sentenced him to forty-eight years and six months at hard labor.

2. The Louisiana Court of Appeal affirmed Petitioner's conviction. Relying on *Apodaca* and the Louisiana Supreme Court's decision in *State v. Bertrand*, 6 So. 3d 738 (La. 2009), the appellate court held that "because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that nonunanimous 12-person jury verdicts are constitutional may someday be overturned," the 10-2 verdict in petitioner's case comported with the Sixth and Fourteenth Amendments. Pet. App. 19a (quoting *Bertrand*, 6 So. 3d at 743). Judge Belsome filed a concurring opinion "acknowledg[ing] that historically a defendant could not be convicted unless the jury verdict was unanimous," but noting that he

was powerless to act on that reality "until otherwise directed by the United States Supreme Court." Pet. App. 20a-22a.

3. Petitioner sought discretionary review in the Louisiana Supreme Court, arguing that convicting him by a non-unanimous jury verdict violated the Sixth and Fourteenth Amendments. The Louisiana Supreme Court denied discretionary review without comment. Pet. App. 23a

REASONS FOR GRANTING THE WRIT

Louisiana is one of two states that allows a person to be convicted of a felony by a less than unanimous jury verdict. (Oregon is the other. *See* Or. Const. art. I § 11; Or. Rev. Stat. § 136.450.) This practice contravenes centuries of common law, as well as longstanding American precedent, requiring unanimity to convict in criminal cases. Nevertheless, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a bare majority of this Court – in a deeply fractured, internally contradictory decision – held that the Constitution does not forbid the states from securing convictions by non-unanimous verdicts.

Subsequent developments in this Court's Sixth and Fourteenth Amendment jurisprudence call the five-vote judgment in *Apodaca* into serious question. In terms of the Sixth Amendment, the plurality opinion in *Apodaca* is squarely inconsistent with this Court's recent, repeated pronouncements in cases reviewing criminal convictions from state courts that the Sixth Amendment requires "that the 'truth of

every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England *343 (1769)); *accord Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010) ("[T]he Sixth Amendment right to trial by jury requires a unanimous jury verdict.") In terms of the Fourteenth Amendment, Justice Powell's concurring opinion cannot be squared with this Court's holding last term in *McDonald* that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." 130 S. Ct. at 3035, 3048 (internal quotation and citation omitted).

Nevertheless, the Louisiana Supreme Court and the Oregon courts have concluded that they are powerless to effectuate *Apocada*'s demise. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodrigeuez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court should exercise that prerogative now. *Stare decisis* has limited force in this case and the constitutional right at stake is enormously important. Furthermore, as Justice (then Judge) Kennedy has explained:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict.

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978). This Court should not allow this fundamental and time-honored protection to be denied any longer.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS.

A. This Court's Recent Jurisprudence Has Severely Undercut its Fractured Holding in 1972 that the Constitution Permits Convictions in State Criminal Trials by Non-Unamimous Verdicts.

A comparison between *Apodaca v. Oregon*, 406 U.S. 404 (1972), and this Court's recent Sixth and Fourteenth Amendment jurisprudence demonstrates that the two are irreconcilable.

1. *Apodaca v. Oregon*

The question whether the Constitution permits a State to convict an individual of a crime based on a non-unanimous jury verdict turns on two sub-issues: (1) whether the Sixth Amendment's jury trial clause requires unanimity for criminal convictions; and (2) if so, whether that constitutional rule applies to the States by means of the Fourteenth Amendment. In *Apodaca*, five Justices answered the first sub-issue affirmatively, and eight answered the second affirmatively (or at least assumed the answer was yes). Yet because of the odd voting patterns in the Court's badly fractured 4-1-4 decision, the Court nevertheless ruled by a bare majority that States may convict individuals of crimes notwithstanding one or two jurors voting "not guilty."

a. The four-Justice plurality in *Apodaca* acknowledged that it had been "settled" since "the latter half of the 14th century . . . that a verdict had to be unanimous" to convict someone of a crime and that this requirement "had become an accepted feature of the common-law jury by the 18th century." *Id.* at 407-08 & n.2. Indeed, this Court had held or assumed in numerous previous cases that the Sixth Amendment required unanimity for a criminal conviction. *See Andres v. United States,* 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required" where the Sixth Amendment applies); *accord Patton v. United States,* 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Thompson v. Utah*, 170 U.S. 343, 351 (1898). Justice Story likewise explained in his noted Commentaries that any law dispensing with the requirement that jurors "must *unanimously* concur in the guilt of the accused before a legal conviction can be had . . . may be considered unconstitutional." 2 Joseph Story, Commentaries on the Constitution § 1779 n.2 (1891) (emphasis in original). And this Court had long since resolved that the Seventh Amendment's jury trial guarantee for civil trials required unanimity. *See American Pub. Co. v. Fisher,* 166 U.S. 464, 467-68 (1897).

The *Apodaca* plurality nonetheless concluded that the unanimity requirement "was not of constitutional stature" in criminal cases. 406 U.S. at 406. It did so for two primary reasons. First, the plurality asserted that instead of following history, "[o]ur inquiry must focus upon the *function* served by the

jury in contemporary society." *Id.* at 410 (emphasis added). After identifying the jury's function as interposing "the commonsense judgment of a group of laymen" between the accused and his accuser, the plurality found that "[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Id.* at 410-11 (quotation omitted).

Second, in response to Apodaca's argument that the Sixth Amendment requires jury unanimity in part "to give effect of the reasonable-doubt standard," the plurality asserted that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412. "We are quite sure," the plurality emphasized, "that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases." *Id.* at 411.

b. Justice Powell provided a fifth vote by concurring in the plurality judgment. He did so, however, by disagreeing with the plurality on both sub-issues presented in the case. In his joint opinion in *Apodaca* and a companion case, Justice Powell stated that he believed, "in accord with both history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial." *Johnson v. Louisiana,* 406 U.S. 366, 371 (1972) (Powell, J., concurring in the judgment). But he also expressly rejected the plurality's "major premise" that "the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept

required by the Sixth Amendment." *Id.* at 369. "Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial," Justice Powell found "no reason to believe . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 374, 376.

c. The four dissenters objected to the Court's judgment as a "radical departure from American traditions." *Johnson,* 406 U.S. at 381 (Douglas, J., dissenting). The dissenters bemoaned the plurality's decision to abandon the previously "universal[] understanding that a unanimous verdict is an essential element of a Sixth Amendment jury trial." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting); *see also Johnson,* 406 U.S. at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting). The dissenters also disagreed with Justice Powell's rejection of the settled rule that the Sixth Amendment's jury trial guarantee "is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting) (emphasis added).

As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*], when a majority of the Court agrees that the Sixth Amendment requires a unanimous

> verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

Johnson v. Louisiana, 406 U.S. at 395 (Brennan, J. dissenting); *see also McDonald*, 130 S. Ct. at 3035 n.14 (emphasizing that the outcome in *Apodaca* "was the result of an unusual division among the Justices").

2. This Court's Current Sixth Amendment Jurisprudence

This Court's modern approach to Sixth Amendment jurisprudence renders *Apodaca* anachronistic. In fact, all three theoretical predicates on which the plurality and Justice Powell's opinions are based have been substantially undercut – if not brought directly into disrepute – by this Court's recent Sixth Amendment decisions.

a. While the *Apodaca* plurality focused "upon the function served by the jury in contemporary society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's

purposes but rather from the original understanding of the guarantees contained therein. In *Crawford v. Washington,* 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause conceived in *Ohio v. Roberts,* 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *Giles v. California,* 128 S. Ct. 2678 (2008), this Court continued that trend, explaining that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 2692. In *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left it to this Court whether to give effect "to the details." *Id.* at 145 (quotation omitted).

Most importantly, in a line of cases beginning with *Apprendi v. New Jersey,* 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id.* at 480. In the course of holding that all sentencing factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal

justice." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). Rather, the controlling datum is "the Framers' paradigm for criminal justice." *Id.*

This pronounced shift in constitutional methodology itself – the return to historical analysis – calls *Apodaca* into serious question. But this Court has gone further. In the *Apprendi* line of cases, this Court explicitly has reaffirmed that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies include the rule "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England 343 (1769). This Court further explained in *Booker v. United States*:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. . . . As we noted in *Apprendi*:
>
> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should

> afterwards be confirmed by the *unanimous* suffrage of twelve of [the defendant's] equals and neighbours . . . ."

543 U.S. 220, 238-239 (2005) (second emphasis added) (quotation omitted); *see also Apprendi*, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*") (emphasis in original). Most recently, this Court flatly stated in *McDonald* that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict." 130 S. Ct. at 3035 n.14.

The *Apodaca* plurality's functional view of the Sixth Amendment cannot be squared with these repeated pronouncements.

b. This Court similarly has disregarded the *Apodaca* plurality's assertion that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." 406 U.S. at 412. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re Winship*, 397 U.S. 358 (1970)] requires) whether he is guilty

> beyond a reasonable doubt. *In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan, 508 U.S. at 278 (second emphasis added). The *Sullivan* Court concluded that a defendant's "Sixth Amendment right to jury trial" is "denied" when a jury instruction improperly defines the concept of reasonable doubt. *Id.*

This Court likewise explained in *Cunningham v. California*, 127 S. Ct. 856 (2007) – another case applying the *Apprendi* rule to a state sentencing system – that "[t]his Court has repeatedly held that, *under the Sixth Amendment*, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, *and established beyond a reasonable doubt*, not merely by a preponderance of the evidence." *Id.* at 863-64 (emphasis added).

It takes little reflection to perceive that the holdings and reasoning in *Sullivan* and *Cunningham* are in serious tension with the plurality's reasoning in *Apodaca*. The pronouncements respecting the Sixth Amendment in all three cases cannot all be right.

3. This Court's Current Fourteenth Amendment Jurisprudence

Justice Powell's partial-incorporation analysis cannot withstand scrutiny either. Even when *Apodaca* was decided, Justice Powell's notion of

applying a clause in the Bill of Rights in a piecemeal manner to state proceedings was difficult to square with this Court's previous "reject[ion of] the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960)). But whatever its viability in 1972, this Court's modern Fourteenth Amendment jurisprudence has long since rendered Justice Powell's "partial incorporation" methodology untenable. In *Crist v. Bretz,* 437 U.S. 28 (1978), the state argued that a particular aspect of the Fifth Amendment's double jeopardy guarantee should not be incorporated against the States. Although Justice Powell agreed with this argument, this Court rejected it, holding that when a component of the Bill of Rights that applies against the States is "a settled part of constitutional law" and protects legitimate interests of the accused, it must apply with equal force to the States. *Id.* at 37-38.

From that point forward, this Court has never approached an incorporation issue – or any other due process issue – by taking, as Justice Powell thought entitled to do, a "fresh look" in public policy terms at whether a given right is essential. 406 U.S. at 376. Rather, the Court has made clear that "crucial guideposts" under the Due Process Clause are now "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quotation omitted); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality

opinion) (due process requires adherence to rights that are "deeply rooted in this Nation's history and tradition"). As even Justice Powell recognized, those historical guideposts demonstrate that at the time of the Founding, "unanimity had long been established as one of the attributes of a jury conviction." *Johnson,* 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *see also supra* at 8 (collecting other historical citations). That reality should settle the question.

If there were any lingering doubt about the legitimacy of Justice Powell's partial incorporation theory – whether in general terms or as applied in particular to the Sixth Amendment's unanimity guarantee – this Court dispensed with it last term in *McDonald.* The City of Chicago, as well as Justice Stevens in dissent, argued there that guarantees in the Bill of Rights "need not be identical in shape or scope to the rights protected against Federal Government infringement." 130 S. Ct. at 3048. Emphasizing that *Apodaca* was "not an endorsement of the two-track approach to incorporation," *id.* at 3035 n.14, this Court categorically rejected the argument. "The relationship between the Bill of Rights' guarantees and the States," this Court explained, "must be governed by a single, neutral principle": "incorporated Bill of Rights protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* at 3035, 3048 (internal quotation and citation omitted). This Court thus made clear that it had "abandoned the notion that

the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Id.* at 3035 (internal quotation marks and citation omitted). "[I]t would be incongruous to apply different standards depending on whether the claim was asserted in a federal or state court." *Id.* (internal quotation marks and citation omitted).

Indeed, this Court's modern Sixth Amendment decisions are already fully consistent with this approach. In *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, this Court applied the *Apprendi* rule to state proceedings without even pausing to consider whether that aspect of the right to trial by jury applied to the States. This Court, in recent years, has proceeded in the same holistic manner with respect to the Sixth Amendment's Confrontation Clause, *see Crawford,* 541 U.S. 36; *Davis v. Washington,* 547 U.S. 813 (2006); the right to counsel, *Alabama v. Shelton,* 535 U.S. 654 (2002); *Strickland v. Washington,* 466 U.S. 669 (1984); and the right to compulsory process, *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). Justice Powell's controlling methodology in *Apodaca* stands as the sole exception to decades of otherwise unbroken precedent.[1]

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[1] To be sure, this Court has held that some guarantees in the Bill of Rights, such as the Fifth Amendment's Grand Jury Clause, do not apply to the States at all. *See Beck v. Washington,* 369 U.S. 541, 545 (1962); *Hurtado v. California,* 110 U.S. 516 (1884). But Justice Powell's opinion in *Apodaca* stands alone as holding that a component of the Bill of Rights that *does* apply to state proceedings does not apply in the same manner, or with the same force, as in federal trials.

B. The Doctrine of *Stare Decisis* Does Not Pose a Significant Impediment to Reconsidering the Question Presented Afresh.

This Court explained in *McDonald* that "if a Bill of Rights guarantee if fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States." 130 S. Ct. at 3036 (footnote omitted). This Court dropped a footnote attached to its reference to *stare decisis*, referencing the Fifth Amendment's Grand Jury Clause, but it did not mention *Apodaca*. It is hard to believe that omission was accidental. For three reasons, the doctrine of *stare decisis* should not stand in the way of this Court's reconsidering the result in *Apodaca* to bring it into line with this Court's current approach to the Sixth and Fourteenth Amendments.

1. Principles of *stare decisis* are at their nadir where a case results in a plurality opinion because no five Justices are able to muster a controlling view concerning the law. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for example, this Court reconsidered and overturned a prior decision – *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) – in part because a majority of the Court (the concurring opinion providing the fifth vote, as well as the dissent) had "expressly disagreed with the rationale of the plurality." *Id.* at 66.

The same is true here. *Apodaca* was a deeply fractured decision. Both Justice Powell's concurrence and the four dissenters expressly disagreed

with the plurality's view that the Sixth Amendment does not require unanimous verdicts to convict. Furthermore, the eight other Justices on the Court disagreed with Justice Powell's "partial incorporation" rationale. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole Tribe,* 517 U.S. at 66.

2. *Stare decisis* has minimal force when the decision at issue "involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 231 (1995). When faced with such situations, therefore, this Court repeatedly has determined that the better course is to reinstate the prior, traditional doctrine. *See id.* at 231-32; *United States v. Dixon,* 509 U.S. 688, 704 (1993) (overruling recent decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987) (overruling decision that had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from precedent); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (overruling recent decision to reinstate

the "view . . . which this Court ha[d] traditionally taken" in earlier cases).

As Justice Powell and the dissenters in *Apodaca* noted without contradiction from the plurality, the plurality's view that the Sixth Amendment does not require unanimity broke sharply from "an unbroken line of cases reaching back to the late 1800's" – and, indeed, from hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also Apodaca*, 406 U.S. at 414-15 (Stewart J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents and reverse the judgment before us.") (citations omitted). Justice Powell's "partial incorporation" rationale likewise ignored this Court's prior precedent that "the Sixth Amendment right to trial by jury in a federal criminal case is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca*, 406 U.S. at 414 (Stewart J., dissenting) (emphasis added); *see also supra,* at 10. Overruling *Apodaca*, therefore, would do nothing more than reinstate the traditional meaning of the Sixth and Fourteenth Amendments. It also would extinguish the schism with this Court's longstanding Seventh Amendment jurisprudence requiring unanimity in civil cases.

3. *Stare decisis* considerations also wane considerably "in cases . . . involving procedural and evidentiary rules," in part because such rules

generally do not induce the same kinds of individual or societal reliance as other kinds of legal doctrines. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Such is the case here. The rules governing juror voting are quintessentially procedural rules. What is more, in the thirty-eight years since *Apodaca* was decided, not a single state has retreated from its requirement that jury verdicts be unanimous to convict in criminal cases. Louisiana and Oregon remain the sole outliers, in exactly the same position as they were in 1972. And no other constitutional doctrine or legislation depends on the continued validity of *Apodaca*. To the contrary, *Apodaca* is an increasingly unexplainable anomaly in this Court's constitutional criminal procedure jurisprudence.

C. The Question Whether States May Continue to Convict Individuals of Serious Crimes Based on Non-Unanimous Verdicts is Extremely Important and Ripe for Consideration.

1. Empirical research conducted since *Apodaca* confirms the wisdom of the historical unanimity requirement and highlights the importance of enforcing that constitutional mandate.

a. The *Apodaca* plurality defended its decision in part based on an assumption that a unanimity requirement "does not materially contribute to the exercise" of a jury's "commonsense judgment." 406 U.S. at 410. The plurality hypothesized:

> [W]e perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

Id. at 411 (footnote omitted).

Evidence amassed from both mock juries and actual Arizona jury deliberations occurring over the last half-century reveals that the plurality's assumptions were incorrect. Specifically, "[s]tudies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials* 24, available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf (last accessed February 27, 2009). As Professors Shari Seidman Diamond, Mary R. Rose, and Beth Murphy explain:

> The Arizona jury deliberations reveal that some of the claims made in favor of dispensing with unanimity are unfounded. The image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the

> judge agreed with the verdict favored by the holdouts in a number of these cases. Instead, the deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.
>
> The primary cost frequently attributed to the unanimity requirement is that it increases the rate of hung juries, a cost that seems overblown in light of the low frequency of hung juries in civil cases, even when unanimity is required. More importantly, a slight increase in hung juries and the potential for a longer deliberation may be costs outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict.

Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 230 (2006). Other scholars have reached similar conclusions. *See* Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (noting "[a] shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment"); John Guinther, The Jury in America 81 (1988) (finding that non-

unanimous juries correct each other's errors of fact less frequently than do juries required to reach unanimity).

b. The *Apodaca* plurality further assumed that allowing non-unanimous verdicts would not marginalize jurors who are members of minority groups. 406 U.S. at 413. This assumption also appears misguided. After considering the effect of non-unanimity rules on dissenting voices, the American Bar Association's American Jury Project concluded that "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." *See* Principles for Juries and Jury Trials, *supra*, at 24. Empirical studies corroborate the observation that jurors who have divergent views contribute more vigorously to jury deliberations when operating under a unanimous verdict scheme. *See id.*; Reid Hastie et al., Inside the Jury 108-12 (1983). It thus comes as no surprise that members of racial and ethnic minorities are often the ones who are outvoted in non-unanimous verdicts. *See, e.g., State v. Potter*, 591 So. 2d 1166, 1167 (La. 1991) ("The vote was eleven to one with the sole 'not guilty' vote cast by one of the black members of the jury. Eleven blacks were peremptorily challenged by the state during voir dire . . . ."). Such verdicts-by-majority-rule undermine the public credibility of our judicial system. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1278 (2000).

The comprehensive empirical research affirming the wisdom of the unanimity requirement, as well as the disproportionately negative impact of non-unanimity rules on jurors of color, led the American Bar Association to conclude that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Principles for Juries and Jury Trials*, *supra*, at 23. Numerous other organizations and commentators have concluded the same. *See, e.g.*, Dennis J. Divine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (reviewing all available social science and concluding that laws allowing non-unanimous verdicts have a significant effect when prosecution's case "is not particularly weak or strong").

2. The consequences of Louisiana and Oregon continuing to allow criminal convictions based on non-unanimous jury verdicts are serious and will continue until this Court steps in. It is not at all uncommon for defendants in these states to be convicted by non-unanimous verdicts. Over the past five years alone, the Louisiana appellate courts have noted over sixty cases in which defendants were convicted of felonies by non-unanimous verdicts[2] – a

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[2] *See* Pet. App. 18a-19a; *State v. Moody*, 38 So. 3d 451, 455 (La. App. 2010); *State v. Every*, 35 So. 3d 410, 420 (La. App. 2010); *State v. Sumrall*, 34 So. 3d 977, 990-91 (La. App. 2010); *State v. White*, No. 09-KA-1122, 2010 La. App. LEXIS 974, at *12 (La. App. June 29, 2010); *State v. Blow*, No. 45,415-KA, 2010 La. App. LEXIS 1148, at *43-45 (La. App. Aug. 11, 2010); *State v. Lawrence*, No. 2009-KA-1637, 2010 La. App. LEXIS 1188, at *27-28 (La. App. Aug. 25, 2010); *State v. Jones*, No. 2009 KA 2261, 2010 La. App. Unpub. LEXIS 258, at *9-11 (La. App. May

7, 2010); *State v. Blanchard*, No. 2010 KA 0014, 2008 La. App. Unpub. LEXIS 417, at *22 (La. App. July 08, 2010); *State v. Lomax*, 35 So. 3d 396, 403 (La. App. 2009); *State v. Jones*, 29 So. 3d 533, 540-41 (La. App. 2009); *State v. Regis*, 25 So. 3d 183, 189 (La. App. 2009); *State v. Taylor*, 21 So. 3d 421, 425 (La. App. 2009); *State v. Smith*, 20 So. 3d 501, 508 (La. App. 2009); *State v. Raymond*, 13 So. 3d 577, 593 (La. App. 2009); *State v. Tillman*, 7 So. 3d 65, 78 (La. App. 2009); *State v. Bertrand*, 6 So. 3d 738, 739 (La. App. 2009); *State v. Martin*, No. 2009 KA 1368, 2009 La. App. Unpub. LEXIS 784, at *4-5 (La. App. Dec. 23, 2009); *State v. Malone*, 998 So. 2d 322, 327 (La. App. 2008); *State v. Johnson*, No. 2008 KA 0500, 2008 La. App. Unpub. LEXIS 448, at *3-6 (La. App. Sept. 19, 2008); *State v. Daigle*, No. 2008 KA 0880, 2008 La. App. Unpub. LEXIS 555, at *6-8 (La. App. Oct. 31, 2008); *State v. Lloyd*, No. 2008/KA/0774, 2008 La. App. Unpub. LEXIS 579, at *2 (La. App. Nov. 14, 2008); *State v. Lee*, 964 So. 2d 967 (La. App. 2007), *cert. denied*, 129 S. Ct. 130 (2008); *State v. Ruiz*, 955 So. 2d 81, 83 (La. 2007); *State v. Elie*, 936 So. 2d 791, 794 (La. 2006); *State v. Mizell*, 938 So. 2d 712, 713 (La. App. 2006); *State v. Mack*, No. 43-KA-206, 2008 La. App. LEXIS 585 (La. App. Apr. 23, 2008); *State v. Brantley*, 975 So. 2d 849, 851 (La. App. 2008); *State v. Gullette*, 975 So. 2d 753, 758 (La. App. 2008); *State v. Linn*, 975 So. 2d 771, 772 (La. App. 2008); *State v. Carter*, 974 So. 2d 181, 184 (La. App. 2008); *State v. Ross*, 973 So. 2d 168, 171 (La. App. 2007); *State v. Baker*, 962 So. 2d 1198, 1201 (La. App. 2007); *State v. Allen*, 955 So. 2d 742, 746 (La. App. 2007); *State v. Tensley*, 955 So. 2d 227, 231 (La. App. 2007); *State v. Johnson*, 948 So. 2d 1229, 1239 (La. App. 2007); *State v. Williams*, 950 So. 2d 126, 129 (La. App. 2007); *State v. Mayeux*, 949 So. 2d 520, 535 (La. App. 2007); *State v. Brown*, 943 So. 2d 614, 620 (La. App. 2006); *State v. Payne*, 945 So. 2d 749, 750 (La. App. 2006); *State v. Riley*, 941 So. 2d 618, 622 (La. App. 2006); *State v. Chandler*, 939 So. 2d 574, 576 (La. App. 2006); *State v. Smith*, 936 So. 2d 255, 259 (La. App. 2006); *State v. Davis*, 935 So. 2d 763, 766 (La. App. 2006); *State v. Scroggins*, 926 So. 2d 64, 65 (La. App. 2006); *State v. Houston*, 925 So. 2d 690, 706 (La. App. 2006); *State v. Christian*, 924 So. 2d 266 (La. App. 2006); *State v. Zeigler*, 920 So. 2d 949, 952 (La. App. 2006); *State v. Wilhite*, 917 So. 2d 1252, 1258 (La.

number that substantially undercounts the frequency of such verdicts because many appellate decisions do not note non-unanimous verdicts. In Oregon, a recent study concluded that almost two-thirds of felony convictions involve at least one non-unanimous count. *See* Br. *Amici Curiae* of Jeffrey Abrahamson et al. at 7, *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117).

Defendants repeatedly have challenged the holding in *Apodaca* in recent years, and they continue to do so. But the Louisiana Supreme Court has made clear that it does not intend to question *Apodaca*. The Louisiana Supreme Court declared its nonunanimity rule "still valid" last year in light of *Apodaca*, *see State v. Bertrand*, 6 So. 3d 738, 741-43 (La. 2009), and, in the wake of this Court's decision in *McDonald*, it denied review in this case. Pet. App. 23a. The Oregon intermediate appellate courts likewise continually tell these defendants that only this Court can declare that *Apodaca* is no longer good law, and the Oregon Supreme Court continues to

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App. 2005); *State v. Hurd*, 917 So. 2d 567, 568 (La. App. 2005); *State v. Wiley*, 914 So. 2d 1117, 1121 (La. App. 2005); *State v. Bowers*, 909 So. 2d 1038, 1043 (La. App. 2005); *State v. Dabney*, 908 So. 2d 60, 65 (La. App. 2005); *State v. Jackson*, 904 So. 2d 907, 909 (La. App. 2005); *State v. Williams*, 901 So. 2d 1171, 1177 (La. App. 2005); *State v. Smith*, 952 So. 2d 1, 16 (La. App. 2006); *State v. Caples*, 938 So. 2d 147, 157 (La. App. 2006); *State v. Pitre*, 924 So. 2d 1176, 1182 (La. App. 2006); *State v. Juniors*, 918 So.2d 1137, 1147 (La. App. 2005), *cert. denied*, 549 U.S. 126 (2007); *State v. Jacobs*, 904 So. 2d 82, 92 (La. App. 2005); *State v. Newman*, 2006 KA 1037, 2006 La. App. LEXIS 3086, at *5 (La. App. Dec. 28, 2006).

deny discretionary review of the issue.[3] And because the nonunanimity rules in both Oregon and Louisiana are based on state constitutions, defendants cannot seek change on state law grounds.

The time has come for this Court to address the disjunction between *Apodaca* and this Court's current view of the Sixth and Fourteenth Amendments. No meaningful percolation can occur in the state courts. Nor is any further empirical research necessary. Two states in our Union have simply decided to violate criminal defendants' fundamental right to jury trial until this Court tells them they may no longer do so.

D. This Case Is An Ideal Vehicle For Reconsidering *Apodaca*.

In the past three Terms, a wide array of groups have filed *amicus* briefs urging this Court to grant certiorari to reconsider *Apodaca*: the American Bar Association, the National Association of Criminal Defense Lawyers, the Louisiana Association of Criminal Defense Lawyers, the Oregon Criminal Defense Lawyers Association, the Charles Hamilton Institute for Race and Justice, and various academic experts. *See Herrera v. Oregon*, No. 10-344 (currently pending); *Bowen v. Oregon*, 130 S. Ct. 52

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[3] *See State v. Pereida-Alba*, 189 P.3d 89 (Or. App. 2007), *rev. denied*, 197 P.3d 1104 (Or. 2008); *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 604 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007).

(2009) (No. 08-1117); *Lee v. Louisiana,* 129 S. Ct. 130 (2008) (No. 07-1523).[4] These groups have argued in various ways that condoning non-unanimous verdicts in criminal cases severely hampers the fair administration of justice and, indeed, the public perception of justice.

The strength of the collective pleas in these cases suggest this is a pressing issue that is not going to go away. And for three reasons, this case presents an ideal vehicle for considering whether our Constitution should continue to tolerate felony convictions by less than unanimous verdicts.

1. This case is from Louisiana, which would allow this Court to consider the constitutionality of nonunanimous verdicts in a setting that highlights the reasons why the Fourteenth Amendment should prohibit this practice. Both the majority and the dissenting opinions in *McDonald* emphasized that the Fourteenth Amendment was designed to guarantee to African Americans the "full and equal benefit" of the provisions of the Bill of Rights. 130 S. Ct. at 3040, 3043 (majority opinion) (quotation and citation omitted); *see also id.* at 3112, 3125, 3133 (Breyer, J., dissenting) (emphasizing that a right should especially apply to states when it is an "*antidiscrimination*" measure designed to protect "discrete and insular minorities") (quotation and citation omitted). Put another way, it is especially

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[4] Petitioner understands that copies of the briefs in *Lee* and *Bowen* remain available in the clerk's office. They also are available online on the Westlaw pages that report the denials of certiorari.

imperative to apply a guarantee of the Bill of Rights against the states when the guarantee has roots in guaranteeing full citizenship to blacks. Thus, the majority and lead dissent in *McDonald* expended considerable energy debating whether the Second Amendment right to bear arms protects African Americans from actual or potential discrimination. *Compare* 130 S. Ct. at 3039-44 (majority opinion) *with* 130 S. Ct. at 3133 (dissenting opinion).

Those concerns are directly relevant in the context of the Sixth Amendment to a unanimous verdict. "A right to jury trial is guaranteed to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Such oppression, of course, has all-too-often in our history taken the form in the criminal justice system of race discrimination. A unanimity voting requirement thus serves as a vital protection against this insidious influence. What is more, the Framers' view, "[t]rials were not just about the rights of the defendant but also about the rights of the community. The people themselves had a right serve on the jury – to govern through the jury." Akhil Reed Amar, America's Constitution 237 (2005). In short, serving on juries, and having one's voice heard, was – and remains – a fundamental act of citizenship and suffrage. *Cf. Blakely*, 542 U.S. at 306 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their ultimate control in the judiciary.").

Louisiana's nonunanimity rule uniquely strikes at the heart of equality and citizenship. The State adopted its nonunaminity rule in its 1898 constitutional convention, whose "mission" was "to establish the supremacy of the white race in this state." *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana,* at 374 (statement of Hon. Thomas J. Semmes). More specifically, the convention was "called together by the people of this State to eliminate from the electorate the mass of corrupt and illegitimate voters who have during the last quarter of a century degraded our politics." *Id.* at 8-9 (opening remarks of E.B. Kruttscchnitt, President of the convention); *see also Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (discussing the "movement that swept the post-Reconstruction South to disenfranchise blacks"); *Louisiana v. United States*, 380 U.S. 145, 147-48 (1965) (discussing steps taken at 1898 convention to "disenfranchise[e] Negroes"). To this end, Louisiana adopted not only a nonunanimity rule at its convention but also its infamous literacy test and one of the South's first Grandfather Clauses.

In light of this history, the Louisiana Supreme Court recently noted, and did not disagree with, the argument that "the use of nonunanimous verdicts ha[s] an insidious racial component, allow[ing] minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution was proscribed." *Bertrand*, 6 So. 3d at 743. But the Louisiana Supreme Court deemed itself powerless to consider that matter in light of *Apodoca*. *Id.* Given the

reasoning in *McDonald*, this Court should directly consider the import of the connection between Louisiana's nonunanimous verdicts rule and race. At the very least, this Court could make clear that even if Oregon's rule can somehow still survive Fourteenth Amendment scrutiny, in light of its less racially sordid history, Louisiana's law surely cannot. *Cf. Hunter*, 471 U.S. at 226-32 (holding that the Fourteenth Amendment's Equal Protection Clause prohibits a state from adopting a law for a racially discriminatory purpose, even if the law could be enacted for legitimate reasons).[5]

2. The facts of this particular prosecution also places the problems associated with allowing less than unanimous verdicts in unusually stark relief. This case arose from a violent confrontation between two men while one, the victim, had crack cocaine in his system. The victim, Baker, initially "lied" to the police about the altercation. Pet. App. 17a. He later testified at trial that petitioner shot him in an unprovoked attack. Petitioner, by contrast, testified that he acted in self-defense. Specifically, petitioner testified that Baker lured him to the scene with a promise to pay him money he owed him and then tried to shoot him first in a drug-induced state. Because no physical evidence favored either story, the prosecution boiled down to a credibility dispute – exactly the kind of case in which the need for stringent procedural safeguards is at its zenith.

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[5] Oregon's nonunanimity rule was adopted by voter initiative in 1934. The voter pamphlet discussed the "problem" of holdout jurors but did not discuss race.

Yet Louisiana's nonunanimity rule provided petitioner anything but stringent protection. Initial 10-2 ballots (the determinative tally in this case) result in guilty verdicts in unanimity regimes only *64.7%* of the time. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 692 (2001) (Table 6). Even when such initial ballots in unanimity regimes lead to hung juries instead of outright acquittals, statistics show that prosecutors respond by dismissing the charges over 20% of the time, and when defendants are retried, they are acquitted in 45% of bench trials and nearly 20% of jury trials. National Center for State Courts, *Are Hung Juries a Problem?*, at 26-27 (2002). Yet, by virtue of the jury's 10-2 vote, Louisiana's judicial system judged petitioner guilty of second degree murder and sentenced him to over forty-eight years in at hard labor.

A Louisiana prosecutor recently commented that when ten of twelve jurors find a defendant guilty of a serious crime, "that's beyond a reasonable doubt." Marcia Coyle, *Divided on Unanimity,* Nat'l L.J., Sept. 1, 2008, at 1. This Court should promptly rebuke that view, which misapprehends not only legal theory but the "effect" of dispensing with the unanimity requirement "on the fact-finding process." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

3. Finally, this case aptly demonstrates the fact, as indicated above, that nonunanimous verdicts are an unfortunately common occurrence in Louisiana

and Oregon. Unless and until this Court addresses the issue, this Court will continue to receive petitions on the subject and uncertainty will reign. Better to grant review now and to put the question to rest.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEAL OF LOUISIANA

FOURTH CIRCUIT

STATE OF LOUISIANA

v.

TROY BARBOUR.

No. 2009-KA-1258

March 24, 2010

(Court composed of Judge DENNIS R. BAGNERIS, SR., Judge MAX N. TOBIAS, JR., Judge ROLAND L. BELSOME).

MAX N. TOBIAS, JR., Judge.

The defendant, Troy Barbour, was charged by bill of information on 15 June 2006 with attempted second degree murder. He pleaded not guilty at his 14 August 2006 arraignment. The trial court granted Mr. Barbour's motion to suppress the identification in part, and denied it in part, and subsequently denied his motion to suppress his statement. He was tried by a twelve-person jury on 16-17 June 2008 and found guilty as charged. On 27 June 2008 the state filed a bill of information charging Mr. Barbour as a fourth-felony habitual offender.

On 1 April 2009 the trial court denied defendant's post-verdict motion to declare La. C. Cr. P. art. 782A unconstitutional to the extent it allows for a non-unanimous guilty verdict in a non-capital felony cases.

On that date the trial court also denied Mr. Barbour's motion for post-verdict judgment of acquittal and motion for new trial. He waived all legal delays and was sentenced to forty-eight years and six months at hard labor, without benefit of parole, probation, or suspension of sentence and granted his motion for appeal.

FACTS

Mr. Barbour was convicted of the 8 January 2008 attempted second degree murder of Donald Baker ("Baker").

Baker confirmed at trial that Mr. Barbour shot him several times on the evening of 8 January 2006. He knew Mr. Barbour as Michael Lee. Baker used to do remodeling and construction work. He hired Mr. Barbour after Hurricane Katrina, after someone brought him to his attention. Mr. Barbour was living in a car and was not eating, to-wit, starving. Baker said he gave Mr. Barbour a place to live and hired him. The defendant eventually found another place to live. On one sheet rocking and paneling job at the residence of Yolanda Jones, Mr. Barbour took a swing at Baker with a hatchet; Baker fired him. Baker subsequently felt sorry for the defendant and rehired him. Mr. Barbour took a swing at Baker again with a hatchet, and Baker told him that was it, and fired him.

Subsequently, Baker was working in Ms. Jones' residence cutting a wall outlet out of a piece of paneling with a jigsaw when something happened that caused him to think he had cut himself. He moved the piece of paneling to inspect where he had cut himself.

He did not realize he had been shot until he stood up and looked to see Mr. Barbour shoot him the second time in the hip. Baker said he flipped off the defendant, and Mr. Barbour shot him a third time, in the armpit, breaking his shoulder blade in seven places. The defendant shot Baker a fourth time, in the left arm, and a fifth and final time, in his shoulder blade. He said Mr. Barbour pulled the trigger again, but the snub-nosed revolver was empty. Baker said the gist of what the defendant was saying to him as he shot him was that he was going to kill him. Baker said he moved to a different room and picked up a razor knife. When Mr. Barbour saw this he grabbed Baker's cell phone and left, telling Baker that he was going to bleed to death. The residence phone apparently had been reconnected, and Baker was able to call 911 for help. Baker told a police officer at the hospital that "Michael Lee" had shot him. On 9 January 2006, Baker was shown a photo of the defendant and confirmed that it was the person who shot him.

Baker confirmed on direct and cross examination that he was aware that while at the hospital his urine tested positive for cocaine. He said he had used cocaine a week and a half to two weeks prior to being shot. He replied in the negative when asked on direct examination whether he had taken or drank anything that would have caused him to not realize what was happening. Baker admitted on cross examination that he previously had been convicted of a crime, destruction of state property, for which he served a sentence of imprisonment. Baker denied on cross examination that he had ever threatened the defendant with a gun. Baker admitted threatening an unknown individual who had broken the windows in

the vehicle he was driving. He admitted that after he fired Mr. Barbour he told him that he would mess him up if he ever got in sight of him. Baker said he delayed telling police who shot him until he got to the hospital because he was worried that the defendant might come back and shoot him again.

Robert Shafor, M.D., was a general surgeon on call at Slidell Hospital on 8 January 2006. He treated the [sic] Baker's gunshot wounds. The victim's wounds were around his shoulders, upper thighs, and the groin. His internal organs and blood vessels were fine, although one wound from a bullet that entered his upper thigh and exited around his scrotum gave him concern because it was fairly close to major blood vessels. Dr. Shafor confirmed that a hospital toxicology test for the presence of narcotics in Baker was positive for cocaine.

Yolanda Jones-Taylor ("Jones-Taylor") testified that after Hurricane Katrina she hired Donald Baker to put a new roof on her home and do some sheetrock work. Baker brought in the defendant to help him with the work. Jones-Taylor identified Mr. Barbour in court. She stated she never saw the victim intoxicated, but acknowledged Mr. Barbour called her to complain that the victim was not paying him. She eventually helped Mr. Barbour get a job sheet rocking with her son the week before the shooting. On the day of the shooting, a Sunday, Jones-Taylor brought the defendant some papers giving him permission to be on the property where her son was working. She picked up Mr. Barbour and dropped him off. Jones-Taylor went home. Baker was there working. The defendant called Jones-Taylor and told her he had forgotten the

papers in her car. Jones-Taylor arranged to meet the defendant at a grocery store on Franklin Avenue and Leon C. Simon Boulevard. She left her home and went there, but never found the defendant. When she returned to her home, she found police there. Baker had been shot. She did not see Mr. Barbour afterwards, and did not hear from him until the next day, when he telephoned her to tell her he had shot Baker and that Baker was probably dead.

Jones-Taylor stated on cross examination that she did not tell Baker she was going to meet the defendant on the day of the shooting because she did not want him to know she was going to meet him. She confirmed that she knew of the feud between the two men and did not want to cause any more problems. Jones-Taylor also stated that she remembered when someone broke the windows on Baker's car, that Baker thought the defendant had done it, and that Baker was angry and upset about it. Baker told her he had a gun that he kept for his protection. She told Baker she did not want any guns in her home.

Alice Barthe ("Barthe") testified that her stepdaughter, Katy, and the defendant stayed with her and her husband in their Tylertown, Mississippi home, and later in a camper on their property from November 2005 until January 2006. A snub-nosed revolver she purchased around the first of January 2006, just after Christmas, was stolen from her home approximately four days after she bought it. It was stolen late Saturday night or early Sunday morning. Barthe said Mr. Barbour and his friend, Jamie, were in the residence that Saturday when she, her stepdaughter, and her husband went to an auction

approximately an hour and a half drive away. When they returned Mr. Barbour and Jamie were gone, a Cadillac automobile was gone, and the revolver was missing from her nightstand. Barthe identified the defendant in court, as well as her revolver.

Ellis Barthe, Alice's husband, testified similarly to his wife. He said they did not get back from the auction until past midnight Sunday.

Susan Barthe, the mother of Katy Barthe, testified that Mr. Barbour and Baker did work on her home, and that the defendant dated her daughter. She identified some recordings made of telephone messages left for Katy on her telephone by Jones-Taylor and the defendant after Baker was shot.

Former New Orleans Police Department Detective Jeffrey Lehrmann testified that he responded to the scene of the shooting on 8 January 2006. The victim was in pain and not very cooperative. A spent bullet was recovered near where the victim was lying on the floor. Jones-Taylor drove up while he was there, and he took a statement from her. At the hospital, Baker told him who had shot him. Detective Lehrmann determined that Michael Lee and Mr. Barbour were the same person. Baker identified a photograph of the defendant. Mr. Barbour was eventually arrested. Mr. Barbour admitted to Detective Lehrmann that he used the name of Michael Lee. During his investigation Detective Lehrmann recovered the revolver stolen from the home of Alice and Ellis Barthe.

Charles Collins, a case manager for a drug court at Orleans Parish Criminal District Court, testified on

behalf of Mr. Barbour that cocaine normally stays in a chronic user's system for three to four days and in a recreational user's system for three days.

New Orleans Police Department Sergeant Leonard Davis wrote a police report on the shooting. He testified that Baker told him that an unidentified white male came inside the residence where he was working, and stated: "Give me the money punk," then produced a handgun and shot him. Sergeant Davis admitted on cross examination that Baker's demeanor was fearful, among other things, and that he was in great pain. Asked whether his ability to interview the victim might have been hampered by his condition, Sergeant Davis replied: "Very much so."

Mr. Barbour testified that he was from Michigan. He mostly did construction work. He had been convicted of safe tampering, twice convicted of breaking and entering, for being a prisoner in possession of a weapon, and for issuing checks with insufficient funds. He was on parole from Michigan, and admitted that he had violated his parole by leaving Michigan without permission. He said that he had to get a job to remain on parole, but could not find one. He asked for permission from his parole officer to travel to New Orleans to find work, but permission was denied. He thought his parole would be revoked anyway if he stayed, because the cutoff period for him to find a job was approaching; thus he left. Mr. Barbour stated that he had never been convicted of a crime of violence. He arrived in New Orleans in September 2005, after Hurricane Katrina had struck. He used an alias, the name of a friend, because he was on the run for a parole violation.

Mr. Barbour said he met and worked with Baker in the area after Hurricane Katrina, and that they made pretty good money, which they split fifty-fifty at the beginning. He said that after working with Baker for about one week he discovered that Baker smoked crack cocaine. He said when Baker received money for work he performed, he would go to a crack house and be gone for a day, sometimes three days. He said when Baker used crack cocaine his eyes would get real wide and he would get aggressive and violent.

Mr. Barbour said Baker had a gun and he had seen it more than once. He said Baker was always shortchanging him and stealing the tools. Disputes over money and ownership of tools occurred. Baker threatened him all the time and had threatened him with a weapon. Baker once said that if he ever saw him again, he would shoot him. Mr. Barbour said that after the trouble between them, he had to leave Louisiana and move to Mississippi. He said that after the split with Baker, he got a friend from Michigan, Jamie Stone, to come to New Orleans and work with him on the job for Jones-Taylor's son.

Mr. Barbour stated that on the day of the shooting, Baker telephoned him to say that if he wanted his money he could come to Jones-Taylor's home to pick it up. He asserted that Baker owed him $3,200.00 for work he had done on Jones-Taylor's home. The defendant told Baker he would be over in a minute. He said that at first he was excited, but on the way there he thought about things and began to feel uneasy. He questioned why Baker now wanted to give him money, especially after everything that had happened. He said

he approached Jones-Taylor's home with caution. He admitted that he had a gun, one he had taken without permission from Ellis Barthe in Mississippi. He said the gun previously introduced in evidence by the state looked like the one he took from Ellis Barthe. Mr. Barbour said he took the gun because Baker had made a lot of threats on his life and those of his loved ones around him.

Mr. Barbour said Jones-Taylor was not there when he went to her home. Baker answered the door, turned around, and started walking into the house. Baker accused the defendant of screwing him out of job, whereupon Mr. Barbour retorted that Baker had screwed himself. He asked Baker if he was going to pay him. Baker replied that he was. The defendant said Baker then reached behind a box and pulled out a .44 Magnum revolver with a six-inch barrel. Mr. Barbour claimed Baker reached around to take a shot at him. Mr. Barbour said he grabbed a halogen light and shined it in Baker's face. He said Baker fired a shot. The defendant then fired a number of shots at Baker, who dropped his gun. Mr. Barbour picked it up. He asked Baker if he was crazy and told him the money was not that important, that Baker could keep it. The defendant said Baker told him that it was not about the money. Mr. Barbour then ran out of the house. He discarded the gun in a debris pile alongside the street. He said neither he nor Baker pulled out a knife. He denied taking Baker's cell phone.

Mr. Barbour admitted hiding from police after the incident. When he was arrested, he did not tell Detective Lehrmann his story because he was not sure Baker would tell police he shot him, since Baker had

tried to kill him. The defendant replied in the negative when asked whether, when he went to Jones-Taylor's house that evening, he had any intention of shooting Baker. He said that he shot Baker in self-defense.

The defendant said on cross examination that when he shot Baker, Baker was under the influence of crack cocaine. He knew that because he smelled it when he entered the residence, and because Baker's eyes were bulging and he was breathing hard. He denied ever having gone after Baker with a hatchet. After the shooting he jumped into the blue Cadillac in which his friend, Jamie, was sitting with engine running, and they left.

Jones-Taylor was recalled as a witness by the state. She testified that when the defendant telephoned her the day after the shooting he told her that he was sorry he had done it, but that at least he had gotten her out of the house. He told her he thought Baker was dead. She did not tell him that Baker was alive.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1

In this first assignment of error, Mr. Barbour argues that the trial court erred in denying his motion for a mistrial based on the state eliciting testimony from the victim concerning other crimes committed by the defendant.

The issue arose when the state was questioning its first witness in its case in chief, the victim. The state was eliciting from the victim a description of the events that occurred at Jones-Taylor's residence, where the defendant and the victim had been working, and where the shooting occurred. The state was directing questions to the victim concerning the defendant's work with the victim, and the following colloquy occurred:

> Q. How long did the defendant actually do the sheetrock work with you inside that residence?
>
> A. About a week, week and half, almost two.
>
> Q. Did he help you finish it?
>
> A. No.
>
> Q. What happened?
>
> A. He took a swing at me with a hatchet and I fired him. I felt sorry for him, brought him back. And he took another swing at me, and I told him that was it.
>
> Q. And where did that second incident occur?
>
> A. In the street in front of Yolanda's house.

At that point defense counsel objected. The jury was removed from the courtroom and Mr. Barbour's counsel moved for a mistrial, which the trial court denied. The trial court strongly admonished the state, and when the jury returned the court admonished it

that it was to disregard the testimony as if it never occurred.

La. C. E. art. 404(B)(1) states:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

The Supreme Court set forth the applicable law in *State v. Rose,* 06-0402, pp. 12-13 (La. 2/22/07), 949 So.2d 1236, 1243-1244, as follows:

> It is well settled that courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. La. C. E. art. 404(B)(1); *State v. Williams,* 96-1023, p. 30 (La. 1/21/98), 708 So.2d 703, 725; *State v. Prieur,* 277 So.2d 126, 128 (La. 1973). Evidence of other crimes, wrongs or acts committed by the defendant is generally inadmissible because of

the "substantial risk of grave prejudice to the defendant." *Prieur*, 277 So.2d at 128. However, the State may introduce evidence of other crimes, wrongs or acts if it establishes an independent and relevant reason such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. La. C. E. art. 404(B)(1). The State must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. *Prieur*, 277 So.2d at 130. Even when the other crimes evidence is offered for a purpose allowed under art. 404(B)(1), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. *State v. Martin,* 377 So.2d 259, 263 (La. 1979); *Prieur*, 277 So.2d at 130. The State also bears the burden of proving that defendant committed the other crimes, wrongs or acts. *State v. Galliano,* 2002-2849, p. 2, (La. 1/10/03), 839 So.2d 932, 933 (per curiam).

Although a defendant's prior bad acts may be relevant and otherwise admissible under La. C. E. art. 404(B), the court must still balance the probative value of the evidence against its prejudicial effects before the evidence can be admitted. La. C. E. art. 403. Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. *State v. Germain*, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. *Id. See also Old*

> *Chief v. United States,* 519 U.S. 172 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). (Footnote omitted).

In addition to the notice requirement imposed upon the state by La. C. E. art. 404(B)(1), La. C. Cr. P. art. 720 states that, upon motion of the defendant, the court shall order the district attorney to provide the defendant with the state's intent to offer evidence of the commission of any other crime admissible under the authority of La. C.E. art. 404. The defendant's trial counsel filed a boilerplate pleading seeking an order from the court directing the state to comply with, *inter alia,* La. C. Cr. P. art. 720.

The state does not dispute that it did not give notice of its intent to use any evidence of any other crime committed by the defendant. Neither does the state argue that evidence that the defendant had swung at the victim with a hatchet on two occasions prior to the day he shot the victim five times was admissible under La. C.E. art. 404 or any other authority.

The state argues instead that, even assuming it failed to give notice and the evidence was inadmissible, the trial court did not clearly abuse its discretion in denying the motion for mistrial and/or that the error in admitting the evidence was harmless.

La. C. Cr. P. art. 775 states that upon motion by a defendant a mistrial "shall be ordered" when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by La. C. Cr. P. art. 770 (mandatory mistrial upon motion of the defendant when prejudicial comment made within hearing of the jury by the judge, district attorney, or a court official referring to, *inter alia,* another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible) or La. C. Cr. P. art. 771 (the trial court may grant a mistrial upon motion of the defendant if the court is satisfied that an admonition is not sufficient to assure the defendant of a fair trial when a remark or comment made within the hearing of the jury during trial or in argument is of such a nature that it might create prejudice against the defendant in the mind of jury).

Mistrial is a drastic remedy which should only be declared upon a clear showing of prejudice to the defendant. *State v. Leonard,* 05-1382, p. 11 (La. 6/16/06), 932 So.2d 660, 667. The mere possibility of prejudice is insufficient to warrant a mistrial. *Id.* Stated a slightly different way, "[m]istrial is a drastic remedy, and is warranted only when the defendant has suffered substantial prejudice such that he cannot receive a fair trial." *State v. Wessinger,* 98-1234, p. 24 (La. 5/28/99), 736 So.2d 162, 183. "The determination of whether actual prejudice has occurred, and thus whether a mistrial is warranted, lies within the sound discretion of the trial judge, and this decision will not be overturned on appeal absent an abuse of that discretion." *Id.*

The victim was the first witness to testify in the trial. His single statement referring directly to the defendant having swung at him with a hatchet is contained in the victim's trial testimony. In hindsight, considering the evidence that followed, we do not find that the trial court abused its discretion in implicitly finding that the statement by the victim did not cause substantial prejudice to the defendant such that he would not be able to receive a fair trial.

Moreover, the erroneous admission of other crimes evidence due to the state's failure to give the defense proper notice, or for any other reason, is subject to the harmless error rule. *State v. Johnson,* 94-1379 (La. 11/27/95), 664 So.2d 94, 102; *State v. Plaisance,* 00-1858, p. 27 (La. App. 4 Cir. 3/6/02), 811 So.2d 1172, 1192. *See also State v. Shaw,* 07-1427, p. 25 (La. App. 4 Cir. 6/18/08), 987 So.2d 398, 412, *writ denied, State ex rel. Shaw v. State,* 08-1957 (La. 5/15/09), 8 So.3d 574 ("The erroneous admission of other crimes evidence is subject to the harmless error analysis."). An error is harmless if it can be said beyond a reasonable doubt that the guilty verdict rendered in the case was surely unattributable to that error. *State v. Robertson,* 06-1537, p. 9 (La. 1/16/08), 988 So.2d 166, 172.

Mr. Barbour admitted shooting the victim. While he claimed self-defense, his testimony contradicted that of the victim and that of Jones-Taylor, at whose residence the victim was working on the day he was shot. Jones-Taylor's testimony indicated that she had been sympathetic to the defendant insofar as his employment plight and squabbles with the victim. She arranged for the defendant to work for her son doing

sheetrock work. She testified that she and the defendant arranged to meet at a grocery store on the evening of the shooting so Jones-Taylor could give him some documents giving him lawful permission to be on the premises of the residence her son was working on in post-Hurricane Katrina New Orleans. Jones-Taylor left her residence to meet the defendant, but he was not at the location where they had agreed to meet. Jones-Taylor returned to her residence to find the victim shot. Mr. Barbour fled and continued to actively elude police, knowing he was wanted in connection with the shooting of the victim.[1] The defendant telephoned Jones-Taylor the day following the shooting, telling her he was sorry he had done it, but that at least he had gotten her out of the house. He admitted to stealing and taking a revolver to Jones-Taylor's residence for his meeting with the victim. Thus, testimony suggests that the shooting was planned by the defendant.

We note the existence of discrepancies in Baker's testimony. He denied owning a gun, but Jones-Taylor said that he told her he did own a gun. The victim lied to police at the scene of the shooting about who had shot him, only divulging the defendant's identity after he was taken to the hospital. The victim explained that he was afraid to name Mr. Barbour while in Jones-Taylor's home because he feared the defendant could be nearby.

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[1] Flight is a circumstance from which guilt can be inferred. *State v. Smith,* 98-2645, p. 5 (La. App. 4 Cir. 1/26/00), 752 So.2d 314, 317-318; H*State v. Recasner,*H 98-2518, p. 3 (La. App. 4 Cir. 12/22/99), 750 So.2d 336, 338.

Nevertheless, assuming *arguendo* (that the testimony by the victim that the defendant had on two occasions prior to the day of the shooting swung at him with a hatchet was inadmissible), viewing all of the evidence, it can said beyond a reasonable doubt that the guilty verdict rendered in the instant case was surely unattributable to the testimony itself or any error relative to the testimony.

We find no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In the second of his two assignments of error, Mr. Barbour argues that the trial court erred in denying his motion to declare La. C. Cr. P. art. 782 A unconstitutional to the extent that it allows for a non-unanimous verdict in non-capital felony cases.

La. C. Cr. P. art. 782A states in pertinent part that "[c]ases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict." The instant case was one in which punishment was necessarily confinement at hard labor. Mr. Barbour was tried by a twelve-person jury, ten of whom concurred to render the verdict of guilty as charged of attempted second degree murder.

The defendant argued in his written motion that La. C. Cr. P. art. 782A violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In *State Bertrand,* 08-2215 (La. 3/17/09), 6 So.3d 738, the trial court found that La. C. Cr. P. art. 782 A violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, relative to the number of jurors needed to concur to render a verdict in cases in which punishment is necessarily confinement at hard labor, the same issue raised by the defendant in the instant case. The Louisiana Supreme Court reversed, stating in its conclusion:

> Due to this Court's prior determinations that Article 782 withstands constitutional scrutiny, and because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12-person jury verdicts are constitutional may someday be overturned, we find that the trial court erred in ruling that Article 782 violated the Fifth, Sixth, and Fourteenth Amendments. With respect to that ruling, it should go without saying that a trial judge is not at liberty to ignore the controlling jurisprudence of superior courts.

Bertrand, 08-2215, p. 8, 6 So.3d at 743.

Bertrand is dispositive of defendant's argument in this assignment of error which we find is meritless.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence is affirmed.

AFFIRMED.

BELSOME, J., concurs with reasons.

I write separately to acknowledge that historically, a defendant could not be convicted unless the jury verdict was unanimous. Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial,* 106 Colum. L. Rev. 959, 979 (2006)(citing *Apodaca v. Oregon,* 406 U.S. 404, 407 & n. 2 (1972)(White, J., plurality opinion); *see also State v. Williams* (unpub.), 2009-0602 (La. App. 4 Cir. 1/27/10, 26 So.3d 321) (Belsome, J., dissenting). The concept of a unanimous jury verdict began as early as the fourteenth century. *Apodaca v. Oregon,* 406 U.S. at 407-08) (citing 1 William Holdsworth, *A History of English Law* 318 (1956), and James B. Thayer, *The Jury and Its Development,* 5 Harv. L. Rev. 249, 295, 296 (1892)); *see also Johnson v. Louisiana,* 406 U.S. 380, 383 (Douglas, J., dissenting). Ultimately, however, the United States Supreme Court concluded that the Constitution did not require unanimous jury verdicts. Rubenstein, *Verdicts of Conscience, supra,* at 979 (citing *Apodaca v. Oregon*, 406 U.S. at 410-411).

With regard to Louisiana jurisprudence, this Court recently followed *State v. Bertrand,* 08-2215 (La. 3/17/09), 6 So.3d 738, in *State v. Taylor,* 2009-0041, p. 8 (La. App. 4 Cir. 9/4/09), 21 So.3d 421, 426, holding that "[t]his recent jurisprudence [referring to *State v. Bertrand*] clarifies that La. C. Cr. P. art. 782(A)'s presumption of constitutionality remains intact." Additionally, prior to the Louisiana Supreme Court's decision in *State v. Bertrand,* this Court found that a defendant's argument that Article 782(A) was unconstitutional lacked merit, relying upon the First

Circuit case of *State v. Lee* and noting the Louisiana Supreme Court's denial of writs in that case. *State v. Tillman,* 2008-0408, p. 25 (La. App. 4 Cir. 3/4/09), 7 So.3d 65, 78 (*citing State v. Lee,* 2005-0456 (La. App. 1 Cir. 5/16/07), 964 So.2d 967, *writ denied, State v. Lee,* 2007-1288 (La. 3/7/08) 977 So.2d 896, *cert. denied, Lee v. Louisiana,* __U.S. __, 129 S. Ct. 130 (2008)). In so holding, this Court quoted the following language from *State v. Lee*:

> These Supreme Court decisions [*Ring v. Arizona,* 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States,* 526 U.S. 227 (1999)] do not address the issue of the constitutionality of a non-unanimous jury verdict but rather, address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the sentencing judge. These decisions stand for the position that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and approved beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. *Nothing in these decisions suggests that a jury's verdict must be unanimous. Accordingly, LSA-Const. Art. I § 17(A) and LSA-C. Cr. P. art. 782(A) are not unconstitutional and do not violate the defendant's Sixth Amendment right to a trial by jury.*

State v. Tillman, 2008-0408, p. 25, 7 So.3d 65, 78 (*quoting State v. Lee,* 2005-0456, p. 4, 964 So.2d 967,

973 (emphasis added)). Therefore, until otherwise directed by the United States Supreme Court or the Louisiana Supreme Court, the trial court's denial of defendant's motion to declare La. C. Cr. P. art. 782(A) unconstitutional must be affirmed. I respectfully concur.

APPENDIX B

IN THE LOUISIANA SUPREME COURT

* * * * * *

On the **19th day of November, 2010**, the following actions were taken by the Supreme Court of Louisiana in the cases listed below:

* * * * * *

WRIT APPLICATIONS DENIED:

* * * * * *

2010-K -0934 STATE OF LOUISIANA v. TROY BARBOUR (Parish of Orleans)

* * * * * *

180 (5)
FILED
JAN 25 2011
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No. 10-689

IN THE

Supreme Court of the United States

TROY BARBOUR,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, prohibits a criminal conviction based on a nonunanimous jury verdict.

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IN THE

Supreme Court of the United States

No. 10-689

TROY BARBOUR,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The underlying facts involving petitioner's crime do not control this Court's analysis of the constitutional question presented. Nevertheless, for the Court's convenience, respondent recites them in brief.

Petitioner was charged by the State of Louisiana on June 15, 2006 with attempted second degree murder, a violation of Louisiana Revised Statute 14:(27)30.1 He pleaded not guilty at his August 14, 2006 arraignment. Prior to trial, petitioner filed a motion in the state district court seeking that court's declaration of Louisiana Code of Criminal Procedure Article 782(A) as unconstitutional to the extent that it allows for nonunanimous guilty verdicts in non-

capital felony cases. Petitioner's motion was denied. On June 16-17, 2006, petitioner was tried by a twelve-person jury and found guilty as charged by a verdict of 10-2. On June 27, 2008, the State charged petitioner as a fourth-felony habitual offender.

Petitioner filed a post-verdict motion in which he re-urged his pre-trial motion. His motion was denied and he was sentenced to forty-eight years and six months at hard labor without benefit of parole, probation, or suspension of sentence.

Petitioner appealed his conviction, which was affirmed by the Louisiana Fourth Circuit Court of Appeal. Petitioner sought discretionary review in the Supreme Court of Louisiana, which summarily denied his application for review.

REASONS FOR DENYING THE PETITION

Petitioner fails to advance any justification for granting his petition for a writ of certiorari. The foundation of petitioner's request is the argument that this Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), is flawed and must be overturned. For the reasons discussed below, were this Court to grant certiorari, the result mandated by this Court's holding in *Apodaca* would remain unaltered. It is therefore unnecessary for this Court to grant the petition for a writ of certiorari.

I. THIS COURT'S DECISION IN *APODACA V. OREGON* IS ENTITLED TO *STARE DECISIS*.

This Court has stated that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Dep't. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). The fundamental importance of

the doctrine flows from the recognition that it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1996) (internal quotation marks omitted).

That being so, this Court has stated that it "approach[es] the reconsideration of [its] decisions . . . with the utmost caution." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). "Even in constitutional cases, the doctrine carries such persuasive force that [this Court has] always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 856 (1996). (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1996))); *see also Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

II. NEITHER PETITIONER NOR HIS *AMICI CURIAE* HAVE OFFERED THE SPECIAL JUSTIFICATION NECESSARY TO OVERTURN *APODACA V. OREGON*.

A. The Sixth Amendment Does Not Require Unanimous Verdicts in Criminal Trials.

Petitioner contends that the Sixth Amendment to the Constitution impliedly requires that the verdicts of all criminal juries be unanimous. It does not. The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

> the crime shall have been committed, which district shall have been previously ascertained by law . . . .

U.S. CONST. amend. VI.

1. Constitutional History Does Not Support a Reading Requiring Unanimity.

This Court has twice recited the relevant history of the drafting of the Sixth Amendment: first, in *Williams v. Florida*, 399 U.S. 78 (1970), and later in *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion). In *Williams*, this Court concluded that, although twelve-member juries were the historical standard at common law, the Sixth Amendment did not require that the number of jurors be fixed at twelve. 399 U.S. at 102-03. In *Apodaca*, the plurality concluded that the Sixth Amendment did not require unanimous verdicts.[1]

Petitioner contends that the *Apodaca* plurality's conclusion was incorrect because unanimous verdicts

---

[1] As this Court recently noted in a footnote to its decision in *McDonald v. City of Chicago*, its ruling in *Apodaca*

> was the result of an unusual division among the Justices . . . . [F]our Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials . . . . [F]our other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials . . . . Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases.

130 S.Ct. 3020, 3035 (2010). The result is, therefore, that defendants in state criminal proceedings, like the petitioner, may constitutionally be either convicted or acquitted by a nonunanimous verdict.

were the common law practice among the colonies at the time the Sixth Amendment was ratified and must therefore be assumed to have been preserved therein. However, as this Court noted in *Williams*, "constitutional history casts considerable doubt on the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." 399 U.S. at 92-93.

That constitutional history, as detailed by this Court in *Williams*, demonstrates that the Sixth Amendment was the result of a contentious drafting process, during which the language of the amendment underwent considerable evolution. *See id.* at 94-97. The first draft of the language, as introduced by James Madison in the House, read, in relevant part:

> The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, *with the requisite of unanimity for conviction*, of the right of challenge, and other accustomed requisites . . . .

1 ANNALS OF CONG. 435 (1789). Although this draft passed the House, it failed in the Senate and was returned to the House considerably altered. S. JOURNAL, 1st Cong., 1st Sess. 71 (Sept. 4, 1789). The Senate Journal indicates that the clause requiring unanimity was stricken. *Id.* The Senate Journal also indicates that a subsequent motion to restore the words providing for "the requisite of unanimity for conviction" failed to be adopted. S. JOURNAL, 1st Cong., 1st Sess. 77 (Sept. 9, 1789). To resolve the chambers' differences, a conference committee was formed. That committee refused to accept not only the original House language but also

an alternate suggestion by the House conferees that juries be defined as possessing "the accustomed requisites." Letter from James Madison to Edmund Pendleton (Sept. 23, 1789), *in* 5 WRITINGS OF JAMES MADISON 424 (G. Hunt ed., 1904). The draft that ultimately emerged from the committee provided, in relevant part, only for

> the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

Williams v. Florida, 399 U.S. 78, 94 (1970). It is this draft that was subsequently adopted as the Sixth Amendment; notably absent from it is any reference to unanimity. Thus, the foregoing history casts considerable doubt on the argument that the Sixth Amendment should be read to require that the verdicts of all criminal juries be unanimous. *See Apodaca v. Oregon*, 406 U.S. 404, 409-10 (1972).

2. The Function of the Jury Does Not Support a Reading Requiring Unanimity.

In an attempt to discredit the *Apodaca* plurality's analysis for its thoroughness, petitioner fixates on the plurality's assertion that its inquiry must focus "upon the function served by the jury *in contemporary society*." 406 U.S. at 410 (citing *Williams*, 399 U.S. at 99-100) (emphasis added). Petitioner argues that the analysis prompted by that statement is inherently flawed because it looks beyond the historical tradition of the common law at the time the Sixth Amendment was ratified. To substantiate his argument, petitioner directs this Court's attention to a

number of cases purporting to disapprove such an analysis: *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Crawford v. Washington*, 541 U.S. 36 (2004); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); and *Giles v. California*, 554 U.S. 353 (2008).

Petitioner's argument is moot. Defining the function of the jury, the *Apodaca* plurality looked to this Court's prior jurisprudence:

> As we said in *Duncan*, the purpose of trial by jury is to prevent oppression by the Government by providing a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. at 156. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . ." *Williams v. Florida*, *supra*, 399 U.S. at 100.

Apodaca, 406 U.S. at 410. The reasoning of this Court's prior decisions in *Duncan* and *Williams* focused on the *historical* function of the jury. In borrowing the definition as stated in those cases, the *Apodaca* plurality implicitly recognized that the function of the jury has not changed over the course of its history. Accordingly, even if the cases cited by petitioner prohibit any but an historical construction of the Sixth Amendment, petitioner's argument is moot because the contemporary definition of the jury's function is identical to the historical definition thereof.

Petitioner next argues that where a jury is not required to return a unanimous verdict, the function of the jury, as described by this Court, will be frustrated. However, as the *Apodaca* plurality noted, this Court has also stated:

> The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.

Williams, 399 U.S. at 100; *Apodaca*, 406 U.S. at 410-11. Inasmuch as *Williams* stands for the proposition that the Constitution allows juries of less than twelve, it is difficult to perceive a qualitative difference between a jury composed of ten returning a unanimous verdict and a jury composed of twelve returning a majority verdict of ten. In either case, the defendant has had the benefit of a trial by a jury of his peers, affording him the interposition of the commonsense judgment of a group of laymen. Moreover, the burden placed upon the State in achieving such a conviction is identical—it must convince ten citizens of the accused's guilt beyond a reasonable doubt.

Notably, although the plurality opinion in *Apodaca* limited its reference to *Williams* to only the foregoing language, *Williams* went on to state:

> We find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained. And, certainly the relia-

> bility of the jury as a factfinder hardly seems likely to be a function of its size.

399 U.S. at 101. At first glance, this language might appear to lend support to an argument in favor of unanimity. However, the *Williams* Court included the following footnote:

> We intimate no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial. While much of the above historical discussion applies as well to the unanimity as to the 12-man requirement, the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof.

Id. at 101 n.46.

Just prior to this Court's decision in *Williams*, the case of *In re Winship* was decided. In *In re Winship*, this Court announced unequivocally:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[2]

---

[2] Petitioner attempts to contradict the plain meaning of this language by invoking this Court's decision in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *Cunningham v. California*, 549 U.S. 270 (2007). That attempt is misguided. Notwithstanding petitioner's assertion to the contrary, *Sullivan* is as unequivocal as *In re Winship* as to the constitutional source of the reasonable doubt standard:

In re Winship, 397 U.S. 358, 364 (1970). Taken together, the two cases thus raised the question of whether the Due Process Clause, and not the Sixth Amendment, requires unanimity. That question was answered with equal certainty by this Court in the companion case to *Apodaca*, *Johnson v. Louisiana*, 406 U.S. 356 (1972). Noting that dissention in a verdict betokens neither failure by the State to carry its burden nor the unsoundness of the judgment of the majority, this Court expressly held that the Due Process Clause does not mandate unanimity of verdicts. *Johnson*, 406 U.S. at 362-63. Accordingly, even if there were a constitutional requirement of unanimity, such requirement could only be found in

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> What the factfinder must determine to return a verdict of guilty is prescribed *by the Due Process Clause*. The prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements. This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.

Sullivan, 508 U.S. at 277-78 (emphasis added). That this Court noted that the Due Process Clause and the Sixth Amendment are "interrelated" is by no means inconsistent with the assertion in both *Johnson* and *Sullivan* that the requirement of proof beyond a reasonable doubt emanates solely from the Due Process Clause. *Id.* at 278.

Cunningham, too, fails to give petitioner the support he seeks. That case addressed the constitutionality of a law permitting judges to find facts by a preponderance of the evidence. *Cunningham*, 549 U.S. at 274. In striking down the law, this Court relied heavily on its prior ruling in *Apprendi v. New Jersey*, in which it stated, "[This] Court has held that due process requires that the jury find beyond a reasonable doubt every fact necessary to constitute the crime." 530 U.S. 466, 499-500 (2000) (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

the Sixth Amendment—a reading which neither history nor policy supports.

3. This Court's Recent Jurisprudence Does Not Support a Reading Requiring Unanimity.

Petitioner argues that this Court's recent jurisprudence offers support for the notion that, under the common law at the time the Sixth Amendment was ratified, juries were required to return unanimous verdicts. Attempting to marshal support for this argument, petitioner invokes the dicta of this Court, warping the meaning of this Court's statements by stripping them of context and cloaking them in textual artifice. In particular, Petitioner points to statements made by this Court in *Apprendi v. California*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *Booker v. United States*, 543 U.S. 220 (2005); and *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).[3]

Petitioner first directs this Court's attention to its quotation in *Apprendi*, *Blakely*, and *Booker* of William Blackstone's *Commentary on the Laws of England* (1769): "[T]he truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ."[4] *Apprendi*,

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[3] It is worth noting that only three of the cases cited by petitioner—*Apprendi*, *Blakely*, and *Booker*—dealt with the Sixth Amendment. *McDonald*, by contrast, dealt with the incorporation of the Second Amendment against the States through the Due Process Clause of the Fourteenth Amendment.

[4] In *Blakely*, this Court omitted the words "whether preferred in the shape of indictment, information, or appeal."

530 U.S. at 477; *Blakely*, 542 U.S. at 301; *Booker*, 543 U.S. at 239.

In both *Apprendi* and *Booker*, this Court italicized the phrase "the truth of every accusation." A review of *Apprendi, Blakely*, and *Booker* reveals that the intended focus of those cases was to clarify (1) that the Sixth Amendment requires all facts tending to influence the sentence imposed on a defendant be found solely by a jury and (2) that the Due Process Clause requires that all facts tending to influence the sentence imposed on a defendant be found beyond a reasonable doubt. In none of those cases did this Court purport to determine whether juries were required, as a matter of constitutional law, to return unanimous verdicts.

Ignoring this focus, petitioner has chosen to italicize the word "unanimous," the effect of which is to draw the reader's attention away from the emphasis placed by this Court on the phrase "the truth of every accusation" and toward a passing reference to "unanimous suffrage," thereby giving the reader a false impression of the language's intended purpose. To suggest that this Court's use of such language signals its tacit approval of a rule requiring unanimity is utterly inconsistent with its context.

Petitioner next asserts that this Court "flatly stated in *McDonald* that 'the Sixth Amendment right to trial by jury requires a unanimous jury verdict.'" What this Court actually stated in a footnote to its decision in *McDonald*—which addressed incorporation of the right to bear arms—was that "[this] Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials."

McDonald, 130 S.Ct. at 3035 n.14 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972).

Accordingly, notwithstanding petitioner's assertions to the contrary, none of this Court's recent jurisprudence supports his contention that the Sixth Amendment requires unanimous verdicts.

4. Empirical Evidence Does Not Support a Reading Requiring Unanimity.

a. Arguments Offered by Petitioner and His *Amici Curiae*.

Petitioner and his *amici curiae* argue, essentially, that the thoroughness of jury deliberation suffers where a unanimous verdict is not required. Attempting to support such an argument, they cite "empirical evidence." However, the fundamental and fatal flaw in the argument is that it assumes that there is a constitutional metric against which the thoroughness of jury deliberation may be measured. There is not.

Although this Court has had the occasion to examine the deliberative process through a constitutional lens, such cases have dealt exclusively with the exertion of improper influence on the deliberative process from sources external to the jury itself. *See, e.g.*, *Smith v. Phillips*, 455 U.S. 209 (1982) (juror in criminal trial had submitted an application for employment at the district attorney's office); *Parker v. Gladden*, 385 U.S. 363 (1966) (bailiff made comments about defendant); *Remmer v. United States*, 347 U.S. 227 (1954) (bribe offered to juror); *Mattox v. United States*, 146 U.S. 140 (1892) (newspaper article read to jurors). This Court has never had the occasion to examine the substance of deliberations

themselves to determine whether they were sufficiently thorough to protect the constitutional rights of a defendant. To some extent, this is necessarily so because jurors are not permitted to testify as to the substance of their deliberations. *See Tanner v. United States*, 483 U.S. 107 (1987); FED. R. EVID. 606(b). Nevertheless, petitioner and his *amici curiae* attempt to persuade this Court by reference to bare statistics not only that there is a constitutional standard for measuring the thoroughness of jury deliberation but also that, in jurisdictions permitting nonunanimous verdicts, such a practice will necessarily fail of such a standard. The studies relied upon by petitioner and his *amici curiae* do not support such a conclusion.

Additionally, as this Court has noted, "bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process." *Matthews v. Eldridge*, 424 U.S. 319, 346 (1976). A number of the studies heavily relied upon by petitioner and his *amici curiae* were of either mock juries or civil juries.[5] The deliberations of such juries cannot be said to be representative of the deliberations of real juries empanelled in real criminal trials, the potential outcome of which may require the privation of the liberty of a fellow citizen.

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[5] *See, e.g.*, Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006); Valerie P. Hans, *The Power of the Twelve: The Impact of Jury Size and Unanimity*, 4 DEL. L. REV. 2 (2001); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1 (1997); Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775 (1992).

Moreover, the proffered data do not present an accurate picture of the totality of the research. For example, in a study cited repeatedly by both petitioner and his *amici curiae*, it is noted that "[w]hen the distribution of verdict preference was compared with final verdicts . . . one of the most robust and widely replicated findings in jury research [emerged]: The verdict preferred by the majority of jurors on the first ballot was the jury's final verdict over 90% of the time."[6]

Petitioner and his *amici curiae* also advance arguments for which they offer no empirical support. For example, in one section of its brief *amicus curiae* discussing minority[7] jurors, the American Bar Association quotes the following passage from an article published in *Harvard Law Review*: "[I]f—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference on the jury." Neither the ABA's

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[6] Dennis J. Devine *et al.*, Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups, 7 PSYCHOL. PUB. POL'Y & L. 622, 623 (2001) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 488 (1966)). It is noteworthy that petitioner, citing to this study, states that "10-2 ballots . . . result in guilty verdicts in unanimity regimes only 64.7% of the time." Petitioner's Brief at 35 (citing Devine, *supra*, at 692 tbl. 6).

[7] Although the studies upon which the American Bar Association relies refer almost exclusively to "minority" jurors in the sense of that word connoting those holding dissenting views, the ABA's brief *amicus curiae* improperly conflates that meaning of the word with its racial counterpart. *See, e.g.*, Brief of the American Bar Association as *Amicus Curiae*, p. 12 ("The ABA concluded that 'minority jurors participate more actively when decisions must be unanimous.'").

amicus brief nor the original article cites any authority for such an assertion.

b. Arguments Not Offered by Petitioner and his *Amici Curiae*.

Worthy of note are the arguments left unmade by petitioner and his *amici curiae*. First, neither petitioner nor his *amici curiae* attempt to argue that there is any correlation between nonunanimous verdicts and wrongful convictions. Second, although petitioner and his *amicus curiae*, the Houston Institute for Race and Justice, imply that Louisiana's practice of allowing nonunanimous verdicts is a vestige of the State's regrettable history on the issue of race, neither petitioner nor his *amici curiae* attempt to argue that there is any correlation between nonunanimous verdicts and the race of defendants so convicted. Finally, neither petitioner nor his *amici curiae* attempt to argue that there is any correlation between nonunanimous verdicts and the gender of defendants so convicted. These arguments are not offered by petitioner and his *amici curiae* because there is no support for them in the scientific literature.

In sum, the empirical evidence that petitioner and his *amici curiae* rely upon falls far short of raising the special justification necessary for overturning the settled holding of this Court's decision in *Apodaca v. Oregon*.

B. The Fourteenth Amendment Does Not Require Unanimous Criminal Verdicts.

Petitioner contends that if, as he also contends, the Sixth Amendment requires federal juries to return unanimous verdicts, the Due Process Clause of the

Fourteenth Amendment necessarily mandates that such requirement be incorporated against the States. Such a contention proceeds from a misapprehension of this Court's approach to the Incorporation Doctrine. Encapsulated within the first eight amendments are manifold "liberty interests." This Court has taken a deliberate and individualistic approach to incorporation of liberty interests, particularly where they have emanated from the Sixth Amendment. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury in criminal cases); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront adverse witness); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (assistance of counsel); *In re Oliver*, 333 U.S. 257 (1948) (right to a public trial).

In determining the manner and extent to which federally guaranteed liberty interests are incorporated against the States, this Court has expressed circumspection:

> [W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court . . . .

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted). With such circumspection as its guide, this Court has also articulated a methodology for determining whether a liberty interest guaranteed by the federal Constitution is so fundamental as to merit incorporation against the States:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," [*Moore v. East Cleveland*] at 503 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. [*Reno v.*] *Flores*, *supra*, at 302; *Collins* [*v. Harker Heights*], *supra*, at 125; *Cruzan* [*v. Director, Missouri Department of Health*], *supra*, at 277-278. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins*, *supra*, at 125, that direct and restrain our exposition of the Due Process Clause.

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997). Thus, to determine whether a federally guaranteed liberty interest is incorporated against the States, it must be described, and then, so described, it must be found to be "fundamental."

This Court has spoken to the appropriate method by which to describe a liberty interest for purposes of this Due Process analysis. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 126 n.6 (1989) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."); *Reno v. Flores*, 507 U.S. 292, 302 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'"); *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) ("[T]he Court has required a 'careful description' of the asserted fundamental liberty interest.") In light of this Court's careful approach to defining an asserted liberty interest at its most specific level, the liberty interest at stake in this case may thus be described as the right to be convicted or acquitted solely by a jury whose verdict is unanimous. Having so defined the liberty interest, it remains to determine whether that interest is so "fundamental" as to be "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721.

1. The History of Jury Practices in the United States Does Not Support a Finding that Unanimous Verdicts are a Fundamental Liberty Interest.

This Court has had the occasion both to review the history of the Sixth Amendment and to interpret its meaning through the lens of the historical common law. *See, e.g., Williams v. Florida*, 399 U.S. 78 (1970). In *Williams*, this Court examined whether the colonies had mechanically received the entirety of English common law, noting:

> "While [the Framers'] general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles."

399 U.S. at 98 n.45 (quoting Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 415 (1907)). The implication of the foregoing assessment is that the colonies were discriminating as to which of the various elements of the English common law were to be received into the American tradition. "With respect to the jury trial in particular," this Court continued:

> [W]hile most of the colonies adopted the institution in its English form at an early date, more than one appears to have accepted the institution at various stages only with 'various modifications.' See [Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367,

> 412 (1907)]. Thus Connecticut permitted majority decision in case of continued failure to agree, *id.*, at 386 . . . Pennsylvania permitted majority verdicts and employed juries of six or seven, *id.*, at 398, and the Carolinas discontinued the unanimity requirement, 5 F. THORPE, FEDERAL AND STATE CONSTITUTIONS 2781 (1909) (Art. 69, 'Fundamental Constitutions of Carolina'). See also [F. Heller, The Sixth Amendment 13-21 (1951)].

Id. Although such facts were ancillary to this Court's ultimate holding in *Williams*, they are immediately relevant to the question presented by this case. To the extent that at various times four of the thirteen original colonies affirmatively rejected the notion that the common law required unanimity of verdicts, it is difficult to perceive how such a requirement could be said to have been fundamental in the context of our Nation's history and traditions. Accordingly, because our history and tradition do not support a finding that the right asserted by petitioner is fundamental, this Court's Due Process jurisprudence does not approve its incorporation against the States.

2. Unanimity Is Not a Fundamental Liberty Interest Because It Neither Augments Nor Diminishes the Historical Purpose of the Jury.

In determining whether the right advocated by petitioner is fundamental, it is also instructive to consider the historical purpose of the jury itself. That purpose was accurately described by the plurality in *Apodaca v. Oregon*:

> [T]he purpose of trial by jury is to prevent oppression by the Government by providing a

> "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. at 156. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . ." *Williams v. Florida*, *supra*, 399 U.S. at 100.

406 U.S. 404, 410 (1972). This Court, in its decision in *Duncan*, cited by this Court in both *Williams* and *Apodaca*, relied on the work of noted jurist and historian Patrick Devlin for its description of the historic role of the jury:

> The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

Duncan, 391 U.S. at 155 n.23 (quoting PATRICK DEVLIN, TRIAL BY JURY 164 (1956)) (internal quotations omitted). Having considered the foregoing, the *Apodaca* plurality concluded:

> A requirement of unanimity . . . does not materially contribute to the exercise of this commonsense judgment . . . In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce

> hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

Apodaca, 406 U.S. at 410-11. Petitioner has advanced no arguments that contradict such a conclusion. Accordingly, while undeniably the right to a trial by jury is fundamental, the requirement of unanimity—because it neither augments nor diminishes the historical purpose served by the jury—is not. To hold otherwise would be to "forever codif[y] a feature . . . incidental to the real purpose of the [Sixth] Amendment" and "ascribe a blind formalism to the Framers" of our Constitution. *Williams v. Florida*, 399 U.S. 78, 102-03 (1970).

CONCLUSION

For nearly forty years, States have relied on the clear result of this Court's decision in *Apodaca*: Jury verdicts in State criminal proceedings need not be unanimous. Neither the Sixth Amendment nor the Fourteenth Amendment compels a different conclusion, and petitioner has failed to provide any justification for disturbing the settled precedent of this Court. Moreover, even if this Court were to grant petitioners request, the result which *Apodaca* approves would remain unaltered. Accordingly, his request for writ of certiorari should be denied.

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No. 10-689

IN THE
Supreme Court of the United States

TROY BARBOUR,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State does not dispute that the question whether it may secure felony convictions through nonunanimous jury verdicts is an exceptionally important constitutional issue that arises frequently in its courts, as well as in Oregon's. Nor does the State contest that this case, unlike *Herrera v. Oregon*, No. 10-344 (cert. denied Jan. 10, 2011), presents an ideal vehicle to resolve the issue. In particular, the jury's 10-2 vote in this "he said, he said" attempted-murder case in which petitioner received a 48-year prison sentence perfectly showcases the uncertainties of non-unanimous verdicts. *See* Pet. 34-35. And the racially discriminatory history of Louisiana's law highlights why incorporating the Sixth Amendment's unanimity principle against the states is vital to fulfilling the objective of the Fourteenth Amendment. Pet. 31-33.

The only argument the State offers for denying certiorari is that this Court should give *stare decisis* effect to its deeply fractured decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which allowed convictions through non-unanimous verdicts. But this argument cannot withstand scrutiny on either legal or practical grounds.

In the 40 years since *Apodaca* was decided, this Court has abandoned not only the constitutional methodology that the plurality employed in that case, but also its specific conclusion that the Sixth Amendment does not require unanimous verdicts. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010); Pet. 12-16. This Court also has

repudiated Justice Powell's conclusion in his decisive concurrence that incorporated provisions of the Bill of Rights – one of which is the right to jury trial, *see Duncan v. Louisiana*, 391 U.S. 145 (1965) – need not apply the same in federal and state courts. *See McDonald*, 130 S. Ct. at 3048; Pet. 16-19. This case thus provides a textbook example of the principle that this Court should at the very least reexamine – and likely overrule – a decision when "related principles of law have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine." *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (overruling is proper when doctrinal changes "have removed or weakened the conceptual underpinnings of the prior decision").

Furthermore, considerations in favor of *stare decisis* are at their nadir "in cases . . . involving procedural and evidentiary rules" because such rules do not produce "reliance" as substantive rules do. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (quotation marks and citation omitted). It thus comes as no surprise that the State cannot point to a single state practice (other than the non-unanimity policy at issue here) or legal doctrine that depends upon *Apodaca*. Nor has the federal government or any other state acted in reliance on *Apodaca*. Louisiana and Oregon remain the sole national outliers, engaging in a practice that flouts centuries of Anglo-American legal heritage and the continuing public perception of the fair administration of justice.

It is, in short, hard to imagine a more compelling case for re-examination of one of this Court's prior decisions or a less compelling case for *stare decisis*. This Court should grant certiorari.

ARGUMENT

The State's attempt to defend the constitutionality of securing criminal convictions by non-unanimous verdicts demonstrates just how incompatible *Apodaca* has become with this Court's Sixth and Fourteenth Amendment jurisprudence. It is imperative that this Court address that schism, not just to bring clarity to its own law but also to provide guidance to Louisiana and Oregon state courts and federal courts across the country.

A. Sixth Amendment

The State argues that "the Sixth Amendment does not require unanimous verdicts in criminal cases." BIO 3. In *McDonald*, however, this Court expressly disavowed any such general rule. There, this Court described *Apodaca* as holding that "although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials." 130 S. Ct. at 3035 n.14. Surely this Court did not mean in this passage to suggest, for the first time in the history of constitutional law, that the same constitutional provision can mean two different things, depending on whether it is invoked in a federal or a state court. Instead, this Court can only have meant to describe *Apodaca* as holding (consistent with the votes of five

Justices in the case, as well as pre-*Apodaca* precedent, *see* Pet. 9) that the Sixth Amendment requires unanimous verdicts, but that the Fourteenth Amendment does not apply that rule to the states. The State's view of the Sixth Amendment cannot be squared with that characterization of this Court's precedent.

Even if the State's reading of *Apodaca* remained plausible, however, it would only heighten the need for certiorari. Every federal court of appeals to have considered the issue since *Apodaca* has concluded that the Sixth Amendment requires unanimous verdicts.[1] Indeed, the federal circuits have held the Sixth Amendment's unanimity requirement is so constitutionally indispensable that a defendant cannot even waive it. *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.); *see also United States v. Pachay*, 711 F.2d 488, 491 (2d Cir. 1983) (agreeing with several other circuits to this effect). If the State's view of the Sixth Amendment were somehow correct, then it would be necessary for this Court to grant certiorari to correct the error in all of this federal precedent. The Sixth Amendment can mean only one thing, and its

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[1] *See, e.g.*, *United States v. Russell*, 134 F.3d 171, 177 (3d Cir. 1998); *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998); *Sincox v. United States*, 571 F.2d 876, 878-79 (5th Cir. 1978); *United States v. Smedes*, 760 F.2d 109, 111-12 (6th Cir. 1985); *United States v. Eagle Elk*, 820 F.2d 959, 961 (8th Cir. 1987); *United States v. Savage*, 7 F.3d 1435, 1439 (9th Cir. 1995); *United States v. Hernandez-Garcia*, 901 F.2d 875, 877 (10th Cir. 1990); *United States v. Ginyard*, 444 F.3d 648, 652 (D.C. Cir. 2006).

protections and effects should not depend on the forum in which a defendant is prosecuted.

B. Fourteenth Amendment

The State also contends that even if the Sixth Amendment requires unanimous verdicts, the Fourteenth Amendment need not incorporate that rule against the states because this Court takes an "individualistic" approach to whether protections in the Bill of Rights apply to the states. BIO 17. This argument likewise flies in the face of *McDonald*. There, this Court held in no uncertain terms that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* at 3035, 3048 (internal quotation and citation omitted). Indeed, this Court thus made clear that it had long since "abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Id.* at 3035 (internal quotation marks and citation omitted). "[I]t would be incongruous to apply different standards depending on whether the claim was asserted in a federal or state court." *Id.* (internal quotation marks and citation omitted).

Nothing in the cases the State cites for its preferred "individualistic" approach (BIO 17-19) suggests the contrary. Those cases, such as

Washington v. Glucksberg, 521 U.S. 702 (1997), are all substantive due process cases in which this Court considered whether a constitutional right existed at all. By contrast, when, as here, the question is merely whether to apply a rule concerning an already-existing constitutional right that applies to the federal government against the states, this Court's equivalence mandate controls. This Court confirmed as much in *McDonald*, asserting that it was a "well-established rule," notwithstanding *Apodaca*'s outcome, that "incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald*, 130 S. Ct. at 3035 n.35. Having thus disavowed the decisive reasoning of *Apodaca*, it is practically incumbent on this Court to overrule the case.

Lest there be any remaining hesitancy regarding the need to re-examine *Apodaca*, both the majority and the dissenting opinions in *McDonald* emphasized that it is especially imperative to apply a guarantee of the Bill of Rights against the states when the guarantee has roots in guaranteeing full citizenship to blacks. *See* 130 S. Ct. at 3040, 3043 (majority opinion); *id.* at 3112, 3125, 3133 (Breyer, J., dissenting). It is therefore striking that while the State expends considerable energy making various arguments on the merits, it never disputes that Louisiana's goal in adopting its non-unanimity rule in 1898 was to disenfranchise blacks and to ensure whites' control over this species, as others, of political decision making. *See* Pet. 33; Amicus Br. of LACDL at 20-31, *Herrera v. Oregon*, No. 10-344 (cert. denied Jan. 10, 2011). This Court was apparently unaware of this history when it decided

Apodaca and *Johnson v. Louisiana*, 406 U.S. 366 (1972). But there is now no justification for allowing the State to continue to enforce this enormously consequential remnant of the Jim Crow era.[2]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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[2] The State's suggestion there is no evidence of "any correlation between nonunanimous verdicts and wrongful convictions" (BIO 16) is wrong. Louisiana has the highest rate of recorded wrongful convictions in the country. *See* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 541 (2006). In any event, "[t]o look upon the jury as a mere judicial institution, is to confine our attention to a very narrow view of it; for, however great its influence may be on the decisions of the law-courts, that influence is very subordinate to the powerful effects which it produces on the communities at large. The jury is above all a political institution," intended to "introduce an eminently republican element into the government." Alexis de Tocqueville, Democracy in America 308-09 (8th ed. 1848).

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On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the states by the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* the American Bar Association ("ABA") respectfully submits this brief in support of Troy Barbour's petition for a writ of certiorari concerning his conviction for second-degree murder on a less than unanimous jury verdict. Specifically, the ABA requests that this Court reconsider its conclusion in *Apodaca v. Oregon*, 406 U.S. 404 (1972), that the Constitution does not require unanimous jury verdicts for state criminal convictions. While Justice Powell, in his concurrence that controlled the outcome in *Apodaca*, relied in part on the 1968 ABA STANDARDS FOR CRIMINAL JUSTICE, the ABA changed its standard on jury verdicts in 1976, based on overwhelming empirical data. For the last thirty-plus years, the ABA has continued to evaluate this standard and has consistently concluded that unanimity should be required in all—federal and state—criminal jury trials. Moreover, the ABA notes that, on January 7, 2011, this Court will consider the petition for a writ of certiorari in *Herrera v. State of Oregon*, No. 10-344, a case that also involves the issue of jury unanimity in state criminal trials. The ABA requests that both writs be granted.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. It has nearly 400,000 members spanning all 50 states and other jurisdictions, and its members include prosecutors, defense counsel, members of the federal and state judiciaries, private attorneys, legislators, academics, and students.[2]

One of the ABA's most prominent efforts has been its development of the ABA STANDARDS FOR CRIMINAL JUSTICE. Over the last forty years, through the work of broadly representative task forces, the ABA has drafted, refined and then approved these Standards as ABA policy.[3] As Chief Justice Burger wrote in 1974 when the first full edition of the Standards was published in seventeen volumes, "[t]he Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Warren E. Burger, *Introduction: The ABA*

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

[3] Standards become official ABA policy when they are adopted by vote of the ABA House of Delegates, which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited Dec. 23, 2010).

Standards for Criminal Justice, 12 AM. CRIM. L. REV. 251, 252 (1974).[4]

Another of its prominent efforts has been the work of the ABA Commission on Standards for Judicial Administration. Established in 1970, this Commission produced the ABA STANDARDS RELATING TO TRIAL COURTS, the first edition of which was published in 1976. In that first edition, as in the current edition, Standard 2.10 states, in pertinent part, that "the verdict of the jury [in criminal cases] should be unanimous."[5]

More recently, in 2004, the ABA established the American Jury Project. In 2005, this Project produced the ABA PRINCIPLES FOR JURIES AND JURY TRIALS, in which the same conclusion was reached in Principle 4.B: "A unanimous decision should be required in all criminal cases heard by a jury."[6]

Each of these endeavors is discussed below. With its deep and long-standing commitment to examining whether criminal jury verdicts should be unanimous, the ABA believes its unique and informed perspective may be of assistance to the Court in this matter.

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[4] The current ABA STANDARDS FOR CRIMINAL JUSTICE and a history of their development are available on the ABA website at http://www.abanet.org/crimjust/standards/home.html (last visited Dec. 23, 2010). *See also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10 (2009), *available at* http://www.abanet.org/crimjust/standards/marcus.pdf (last visited Dec. 23, 2010).

[5] The 1976 ABA STANDARDS FOR JUDICIAL ADMINISTRATION are available from the ABA.

[6] The ABA PRINCIPLES FOR JURIES AND JURY TRIALS are *available at* http://www.abanet.org/juryprojectstandards/ (last visited Dec. 23, 2010).

SUMMARY OF ARGUMENT

1. Justice Powell, in his concurrence in *Apodaca v. Oregon*, 406 U.S. 404 (1972), determined that the Constitution does not require unanimous jury verdicts in state criminal trials. While this determination was based in part on a 1968 ABA standard that accepted less-than-unanimous verdicts, the ABA changed its Standard in 1976 to affirm that jury verdicts in criminal trials should be unanimous.

Throughout the thirty-plus years since *Apodaca*, the ABA has reaffirmed that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial. Most recently, in 2005, as the result of its American Jury Project, the ABA adopted nineteen core jury trial principles, one of which provides that a unanimous decision should be required in all criminal cases heard by a jury.

2. The ABA's standards have always been based on comprehensive review of research and empirical data on the jury's role in the criminal justice system. This work, some of which is discussed below, has led the ABA to conclude that a non-unanimous decisional process reduces the reliability of jury determinations, silences minority viewpoints, erodes confidence in the criminal justice system, and does not significantly contribute to a reduction in hung juries and retrials.

Because each member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints, and community confidence in jury verdicts, and because the ABA's review of research and empirical data—as well as the consensus of the legal community—has concluded that a non-unanimous decision process does not

secure those aims, the ABA supports petitioner's request that the Court revisit *Apodaca*.

ARGUMENT

I. ABA STANDARDS AFTER 1976 AND ITS 2005 PRINCIPLE ON JURY UNANIMITY FOR CRIMINAL TRIALS SUPPORT THIS COURT'S RECONSIDERATION OF *APODACA*.

A. *Apodaca* Relied On The 1968 ABA Standards.

As petitioner explains, this Court's decision in *Apodaca* permitting non-unanimous jury verdicts in state criminal trials was the product of an unusual combination of disparate positions, in which five Justices agreed that the Sixth Amendment requires unanimous jury verdicts, and eight Justices agreed that the Sixth Amendment applies in full to the states. *See* Pet. 8-12. Notwithstanding this agreement, Justice Powell's concurrence, and thus this Court's judgment, concluded that the Constitution does not require states to convict by unanimous verdicts.

Justice Powell viewed the unanimity question as requiring "a fresh look at the question of what is fundamental in jury trial." *Johnson v. Louisiana*, 406 U.S. 356, 376 (1972) (Powell, J., concurring in judgment). Justice Powell determined that deviation from the constitutional standard of unanimity for federal convictions was appropriate in part because "[l]ess-than-unanimous verdict provisions . . . have been viewed with approval by the American Bar Association's Criminal Justice Project." *Id.* at 377 & n.19 (citing ABA STANDARDS FOR CRIMINAL JUSTICE,

TRIAL BY JURY, Standard 1.1 (Approved Draft 1968) ("1968 CRIMINAL JUSTICE STANDARDS")).

In 1972, when *Apodaca* was decided, Standard 1.1 of Volume 15, *Trial by Jury*, of the 1968 CRIMINAL JUSTICE STANDARDS provided, in relevant part:

> 1.1 Right to jury trial.
>
> Defendants in all criminal cases should have the right to be tried by a jury of twelve whose verdict must be unanimous, except that where not barred by applicable constitutional provisions, the right to jury trial may be limited in one or more of the following ways:
>
> * * *
>
> (d) by permitting less than unanimous verdicts, without regard to the consent of the parties.

In the Commentary to Standard 1.1, the Advisory Committee, on reviewing current thinking on jury unanimity, "concluded that the minimum standards should recognize the propriety of less than unanimous verdicts, as now permitted in six states." *Id.* at 28.[7]

B. By 1976, The ABA Had Concluded That Unanimous Juries Should Be Required In Criminal Trials.

However, in 1976, another ABA commission, the Commission on Standards of Judicial Administration, presented its final draft of the ABA STANDARDS RELATING TO TRIAL COURTS ("1976 JUDICIAL STANDARDS"), in which its Standard 2.10 stated, in

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[7] The 1968 CRIMINAL JUSTICE STANDARD 1.1 and its Commentary are available from the ABA.

pertinent part, "[t]he verdict of the jury [in criminal cases] should be unanimous."[8]

In the Commentary to Standard 2.10, the Commission acknowledged that this was an enlargement of the scope of the jury trial right stated in Volume 15, Standard 1.1 of the 1968 CRIMINAL JUSTICE STANDARDS, but concluded, "[i]f the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, these qualifications [in Standard 1.1] appear to be both unnecessary and unwarranted by our legal traditions." 1976 JUDICIAL STANDARDS, *supra*, at 24.

The 1976 JUDICIAL STANDARDS were adopted as ABA policy at the ABA's Midyear Meeting in February 1976. In the course of their adoption, the ABA also authorized amendment to Standard 1.1 to conform to Standard 2.10 of the 1976 JUDICIAL STANDARDS, specifically affirming that, "[i]n criminal cases, the verdict of the jury should be unanimous." ABA SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, MIDYEAR MEETING, REPORT OF THE COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, at 18 (1976).

Accordingly, when the 1978 edition of Volume 15, *Trial by Jury*, of the ABA STANDARDS FOR CRIMINAL JUSTICE ("1978 CRIMINAL JUSTICE STANDARDS") was published, its Introduction stated: "Incorporating the

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[8] The 1976 JUDICIAL STANDARD 2.10 and its Commentary are available from the ABA.

ABA Standards of Judicial Administration, this updated standard [now 15-1.1] has been changed by deletion of . . . (1) recogni[tion] [of] the propriety of nonunanimous jury verdicts." *Id.* at 15-4.[9]

Any support that the ABA's 1968 CRIMINAL JUSTICE STANDARDS had lent to a position that permitted non-unanimous verdicts had thus ended by 1976.

C. In 2005, The ABA Reaffirmed Its Commitment To Unanimous Verdicts In Criminal Trials.

Throughout the next thirty-plus years, the ABA has repeatedly reaffirmed its conclusion that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial.[10] Most recently, in 2004, the ABA established the American Jury Project, which promulgated nineteen core jury trial principles that define the ABA's "fundamental aspirations for the management of the jury system." ABA PRINCIPLES FOR JURIES AND JURY TRIALS, Preamble, at 1 (2005) ("2005 JURY TRIAL PRINCIPLES").[11] Principle 4.B provides that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Id.* at 23.

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[9] The 1978 CRIMINAL JUSTICE STANDARDS and their Introduction are available from the ABA.

[10] *See, e.g.*, ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 17, at 150 (1983); ABA STANDARDS RELATING TO TRIAL COURTS, Standard 2.10, at 19 (1992); ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 17, at 156 (1993 update); and ABA CRIMINAL JUSTICE STANDARDS, Standard 15-1.1, at 121 (1996).

[11] The 2005 JURY TRIAL PRINCIPLES and their Preamble are available from the ABA.

The ABA's long-standing position on jury unanimity in criminal trials is the result of its continuing and comprehensive study of the jury's role in the criminal justice system. As this Court noted in 2005, it "long ha[s] referred to the [] ABA Standards as guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (internal punctuation and quotation marks omitted)). The ABA now offers its accumulated experience, study, and the evolved consensus of the legal community in support of its conclusion that the "fresh look" authorized by *Apodaca* in 1972 should be reconsidered and replaced with the requirement that, in jury trials, all criminal defendants—in federal and state courts—should have the right to unanimous verdicts.

II. EMPIRICAL RESEARCH, WHICH IS THE HEART OF ABA STANDARDS, SUPPORTS RECONSIDERATION OF *APODACA*.

Little empirical research on jury behavior existed when this Court decided *Apodaca* that might have confirmed or disproved the predictions underlying the decision. Since that time, however, extensive studies have been conducted that support reconsideration of the decision.

When the ABA revised its CRIMINAL JUSTICE STANDARDS in 1978, it explained that several changes in the standards, including the shift to unanimous jury verdicts, were made "to reflect the experience gained in the past decade and new perspectives in the wide-ranging topic of jury trial." 1978 CRIMINAL JUSTICE STANDARDS, *supra*, Introduction at 15-4. In its 2005 JURY TRIAL PRINCIPLES, the ABA discussed

empirical studies showing that a non-unanimous decision process reduces the reliability of jury determinations, silences minority viewpoints, and erodes confidence in the criminal justice system. 2005 JURY TRIAL PRINCIPLES, *supra*, at 24-25. The ABA also concluded that studies had demonstrated that another justification for non-unanimity—a reduction in hung juries and retrials—was overstated. *Id.* at 25.

In light of this amassed research, which shows that the non-unanimous process in criminal jury trials fails to foster thorough jury deliberations, attention to minority viewpoints, or community confidence in jury verdicts, the ABA suggests that *Apodaca*'s holding should be reconsidered.

A. Non-Unanimous Verdicts Reduce The Reliability Of Jury Determinations.

Empirical research since *Apodaca* calls into question the plurality's prediction that, from a functional standpoint, there would exist "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Apodaca*, 406 U.S. at 411 (plurality opinion).

In the Commentary to Principle 4.B of the 2005 JURY TRIAL PRINCIPLES, for instance, the ABA concluded that empirical data had shown that non-unanimous decision rules materially alter jury deliberations and decrease the reliability of verdicts:

> Implicit in [the historical preference for unanimous juries] is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions—ones that address and persuade every juror. Empirical assessment tends to

> support this assumption. Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots . . . . In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached.

Id. at 24 (citing Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001)); *see also* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 HARV. L. REV. 1261, 1273 (2000) (citing empirical research demonstrating that "majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable"); JEFFREY B. ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 205 (2000) ("Majority verdicts signal an entirely different type of behavior, where jurors ultimately remain free to assert their different interests and opinions against one another. The distinctive genius of the jury system has been to emphasize deliberation more than voting and representation."); REID HASTIE ET AL., INSIDE THE JURY 60 tbl. 4.1 (1983) (finding that twelve-member jurors required to reach a unanimous verdict deliberated for 138 minutes on average, whereas those required to reach an eight-member majority deliberated for an average of seventy-five minutes).

Further, research has shown that individual jurors themselves are less confident in the decisions they reach under non-unanimous decision rules. *See* Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6

S. CAL. INTERDISC. L.J. 1, 41 (1997) ("[T]he existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict."). Further, the wisdom of a unanimous verdict requirement is shown by research on group decision-making, in that better outcomes are produced after full consideration of a truly dissenting viewpoint, as compared with those produced when a member of the majority simply plays "devil's advocate." *See* Charlan J. Nemeth et al., *Devil's Advocate Versus Authentic Dissent: Stimulating Quantity and Quality*, 31 EUR. J. SOC. PSYCHOL. 707 (2001).

B. Non-Unanimous Verdicts Allow Juries To Reach A Quorum Without Seriously Considering Dissenting Viewpoints.

Empirical studies also do not support the *Apodaca* plurality's prediction that dissenting viewpoints "will be heard" even under non-unanimous decision rules. *Apodaca*, 406 U.S. at 413 (plurality opinion); *see also Johnson*, 406 U.S. at 361 ("We have no grounds for believing that majority jurors . . . would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict.").

As the ABA found, "[u]nanimous verdicts also protect jury representativeness—each point of view must be considered and all jurors persuaded." 2005 JURY TRIAL PRINCIPLES, *supra*, at 24 (citing HASTIE ET AL., *supra*, at 45-58; Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 2, 23 (2001); Devine et al., *supra*, at 669). The ABA concluded that "minority jurors participate more actively when decisions must be unanimous." *Id.*

In contrast to the "deliberate, ponderous atmosphere" characteristic of deliberations of unanimous juries, researchers have found that "larger factions in majority rule juries adopt a more forceful, bullying, persuasive style," possibly "because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members." HASTIE ET AL., *supra*, at 112; *see also* Saks, *supra*, at 40 ("Compared to unanimous rule juries, quorum rule juries have been found to deliberate less equitably (that is, the distribution of talking is skewed more extremely, with the talkative jurors talking more and the untalkative talking less than in unanimous rule juries).").

Researchers also have found that permitting non-unanimous verdicts "discourage[s] meaningful examination of opposing viewpoints" and thus "impoverishes deliberations." Taylor-Thompson, *supra*, at 1264. When jurors are required to reach unanimity, however, "jurors at the extremes may be driven to a compromise which they would otherwise reject, and a fairer verdict may result." ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 15-1.1 Commentary, at 126 (1996) (citing Edward P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 GEO. L.J. 775 (1992)).[12]

Notably, "[i]f—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference on the

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[12] The 1996 ABA STANDARDS FOR CRIMINAL JUSTICE and their Commentary are available from the ABA.

jury." Taylor-Thompson, *supra*, at 1264. As Justice Stewart warned, "[u]nder [*Apodaca* and *Johnson*], nine jurors can simply ignore the views of their fellow panel members of a different race or class." *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting); *cf. also* Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1028-29 (2008) (examining the threat to justice posed by the unconscious prejudices of jurors). In related areas implicating Sixth Amendment rights, this Court has stringently protected the participation of women and minorities on juries. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

As Justice (then-Judge) Kennedy recognized in 1978, unanimous decision rules facilitate deliberation by ensuring that dissenting voices are heard and accepted or rejected, thus lending "particular significance and conclusiveness to the jury's verdict." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978).

C. Non-Unanimous Verdicts Undermine The Community's Confidence In The Justice System.

Empirical evidence similarly undercuts Justice Powell's prediction in *Apodaca* that unanimous jury verdicts would not be "entitled to greater respect in the community." *Johnson*, 406 U.S. at 374 (Powell, J., concurring in judgment). Instead, research has demonstrated that a non-unanimous decision rule "fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system." 2005 JURY TRIAL PRINCIPLES, *supra*, at 24-5 (citing Taylor-Thompson, *supra*, at 1315). *See*

also Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 L. & HUM. BEHAV. 333, 337-38 & tbl.1 (1988) (citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer); Barbara A. Babcock, *A Unanimous Jury is Fundamental to Our Democracy*, 20 HARV. J.L. & PUB. POL'Y 469, 472 (1997) (the need to reach consensus promotes the credibility of the judgment because "[a] unanimous verdict is a major accomplishment and carries with it moral authority that a split decision lacks"); ABRAMSON, *supra*, at 182 (unanimity serves as a "pillar of popular faith in the legitimacy and accuracy of jury verdicts"). By contrast, "[b]oth the defendant and society can place special confidence in a unanimous verdict." *Lopez*, 581 F.2d at 1341 (Kennedy, J.).

D. The Connection Between Unanimity And Hung Juries Has Been Overstated.

Justice Powell's opinion in *Apodaca* suggested that eliminating unanimity requirements "could well minimize the potential for hung juries occasioned either by bribery or juror irrationality." *Johnson*, 406 U.S. at 377 (Powell, J., concurring in judgment). Studies of hung juries largely negate those concerns, however, and instead bolster arguments favoring unanimity.

Research shows that juries rarely hang because of one or two obstinate jurors. 2005 JURY TRIAL PRINCIPLES, *supra*, at 25 (citing Taylor-Thompson, *supra*, at 1317). To the contrary, "[g]enerally, when deadlocks occur, they reflect genuine disagreement

over the weight of the evidence and arise within juries that had substantial differences in verdict preference at the outset of deliberations." *Id.* (citing PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? 67 (2002); HASTIE ET AL., *supra*, at 166-67; and Saks, *supra*, at 41).

As other research shows, eccentric or irrational holdout jurors do not normally derail unanimity. Instead, "[t]he majority of hung juries in criminal cases in which unanimity is required do not reflect a lone holdout or even two dissenters, but rather a more evenly divided final vote." Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 228 (2006). Juries tend to deadlock only when there is a "massive minority of 4 or 5 jurors"—rather than just one or two holdouts—at the beginning of the deliberative process, even if the number of dissenters is later reduced. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 462 (1966).

Further, it is the complexity of the case that affects the likelihood of jury deadlock: one study found the incidence of hung juries to be 10% in close, difficult cases, but only 2% in clear, easy cases. *Id.* at 457. In fact, in a study of civil cases, the judges agreed with holdout jurors over 40% of the time when a non-unanimous verdict was rendered, and disagreed with the jury in approximately 20% of the cases in which the verdict was unanimous. Seidman Diamond et al., *supra*, at 222. "[T]he agreement between the judge and the holdout jurors on a substantial number of cases suggests that the conflict on some of these juries posed precisely the kind of challenge to the

majority position that a deliberative process should welcome." *Id.*

Finally, research has shown no significant increase in the number of hung juries when jury unanimity is required. A survey of trial judges conducted in the 1950s found that, where unanimous verdicts were required, 5.6% of juries ended in deadlock, compared with 3.1% where majority verdicts were permitted. 2005 JURY TRIAL PRINCIPLES, *supra*, at 25 (citing KALVEN & ZEISEL, *supra*, at 461). A more recent review found that in the federal court system, which requires juror unanimity for all criminal verdicts and presumes a unanimity requirement for civil trials, the jury hung in only 1.2% to 2.0% of cases between 1980 and 1997. *See* Paula L. Hannaford *et al.*, *How Much Justice Hangs in the Balance?*, 83 JUDICATURE 59, 63 (1999). For federal criminal trials, the hung jury rate never surpassed 3.0% during that period. *Id.*

The costs of hung juries also are exaggerated, as shown by a study of California cases in which jury deadlocks resulted in retrials in only 26% of cases; all other cases were disposed of by guilty plea or dismissal. *See* Leo J. Flynn, *Does Justice Fail When the Jury is Deadlocked?*, 61 JUDICATURE 129, 133 (1977).

As a comprehensive study of hung juries reported, eliminating unanimous decision rules for jury verdicts "would address the symptoms of disagreement among jurors without necessarily addressing the actual causes—namely, weak evidence, poor interpersonal dynamics during deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases." HANNAFORD-AGOR ET AL., *supra*, at 86.

Because research reveals that the non-unanimous jury process does not reduce hung juries, the ABA urges the Court to revisit the *Apodaca* holding.

CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 10-689

IN THE
Supreme Court Of The United States

TROY BARBOUR,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF OF *AMICUS CURIAE* THE HOUSTON INSTITUTE FOR RACE AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) was founded in September 2005 by Charles Ogletree, Jr., Jesse Climenko Professor of Law at Harvard Law School. The Institute continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. Houston helped to engineer the multi-year legal strategy that led to the unanimous decision by this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Sadly, however, he died in 1950, at the age of 54, before he could witness his efforts coming to fruition.

The Charles Hamilton Houston Institute marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers in a variety of forums, conferences and meetings. The Institute is initially focusing on, among other things, reforming criminal justice policies. *Amicus Curiae* accordingly has a keen interest in having this Court revisit its fractured and historically unsound determination in *Apodaca v. Oregon,* 406 U.S. 404 (1972) and *Johnson v.*

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[1] Pursuant to Rule 37.2(a), both parties received notice of the filing of this brief more than 10 days prior to the due date. A letter of consent from each party accompanies this filing. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

Louisiana, 406 U.S. 356 (1972), that non-unanimous jury verdicts in criminal cases satisfy the Sixth Amendment's jury trial guarantee. As we demonstrate below, non-unanimous jury verdicts in criminal cases create a qualitatively lesser form of justice and hold the potential to marginalize the views of women and people of color as they fulfill their obligation to serve on juries. Given that the analytical basis for these decisions is fundamentally out of step with this Court's modern Sixth and Fourteenth Amendment jurisprudence, to delay resolution of the unanimity question raised in the Petition for Certiorari ("Petition") will perpetuate confusion and facilitate injustice in a substantial number of cases in Louisiana and Oregon, the only two states that continue to permit non-unanimous jury verdicts in criminal cases.

SUMMARY OF ARGUMENT

The Court should grant the Petition to decide the important question of whether the Sixth Amendment, as applied to the states by means of the Fourteenth Amendment, requires unanimity in state criminal cases. The Petition focuses largely on demonstrating why the jurisprudential approach utilized in *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), cannot be squared with the legal analysis the Court has relied upon in recent cases such as *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), *Giles v. California*, 554 U.S. 353 (2008), *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), *Blakely v. Washington*, 542 U.S. 296 (2004), *Crawford v. Washington*, 541 U.S. 36 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. at 12-16.

Petitioner is correct that the disparity between the approach taken by the Court in the *Apodaca* and *Johnson* decisions—in which a centuries-old tradition of jury unanimity was swept aside based on judicial estimates about the functional importance of the unanimity requirement—and the approach to the Sixth and Fourteenth Amendments taken by the Court in recent cases creates considerable legal uncertainty about the validity of criminal jury verdicts in jurisdictions like Louisiana and Oregon. *Amicus Curiae* fully supports Petitioner's argument that certiorari should be granted to address the continued viability of *Apodaca* and *Johnson* in light of the modern approach adopted in cases like *McDonald*, *Blakely*, *Crawford*, *Gonzalez-Lopez* and *Apprendi*.

Amicus writes separately to emphasize the practical necessity of granting the Petition. This necessity stems from the fact that, setting aside whether the *Apodaca* Court should have engaged in a functional analysis at all, the Court's conclusion with regard to the supposedly minimal importance of the unanimity requirement has now been cast into grave doubt by a generation of empirical research on jury decision making.

According to the Court in *Apodaca*, there is no functional difference between a unanimous jury verdict and a verdict rendered by a vote of 11 to one or 10 to two. *Apodaca*, 406 U.S at 410-11. If this were correct, then the question presented by the Petition would be largely an academic one. However, empirical research conducted over the past 35 years has demonstrated that the unanimity requirement

matters significantly because it fundamentally alters the jury dynamic. In short, it is now apparent that there is a real difference between trial by jury in Louisiana and Oregon, and the traditional jury trial guarantee that existed at the time of the Founding and is still applied elsewhere throughout the Nation.

In particular, as we discuss in detail below, modern empirical research has demonstrated that unanimous juries are more careful, more thorough, and return verdicts that are more in line with what experienced observers of the criminal justice system (generally judges) view to be the correct verdict. Unanimous juries are, in other words, demonstrably more reliable. In addition, and of critical concern to *Amicus Curiae*, the historic unanimity requirement ensures that the viewpoints of *every* juror are carefully considered by fellow jurors, and the resulting unanimous verdict is viewed as more legitimate by all members of the Community.

By contrast, eliminating the traditional unanimity requirement has been shown to produce a situation in which a majority of jurors can marginalize the viewpoints of other jurors by refusing to deliberate further once the majority threshold has been reached. This concern applies to all juries and all jurors, but its effects can be particularly stark when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities. In such cases, a state law provision permitting non-unanimous criminal verdicts can serve as a *de facto* means of allowing majorities of jurors to prevent minority jurors from jury participation, thereby undermining important

Constitutional principles regarding equality in jury service that this Court has taken considerable measures to protect in recent years.

Although the arguments discussed at length in the Petition demonstrate why the question presented is worthy of the Court's attention, the empirical evidence on jury decision making shows why it is critical that this Court confront the question now. The traditional unanimity requirement serves as a basic component of the Sixth Amendment's jury guarantee, which is not currently being afforded to accused persons in Louisiana and Oregon. The Court's corrective intervention is urgently needed.

ARGUMENT

Although systematic empirical research on jury decision making began in 1953 with the initiation of the Chicago Jury Project, *see* Dennis J. Devine *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol., Pub. Pol'y & L. 622, 623 (2001)[2], and although the Court, in part, relied on some of the early research in *Apodaca*, 406 U.S. at 411 n.5[3], most of the empirical

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[2] As the commentary referencing the Devine article makes clear, that article is "a comprehensive review of the empirical research on jury decision making published between 1955 and 1999." Devine *et al.*, *supra*, at LEXISNEXIS "Highlight" comment. It compiles and organizes data from 206 studies involving actual and mock juries, studying several variables, including rule of decision, and it identifies common themes throughout the studies. *Id.*

[3] When it commented that "[r]equiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers

research on jury dynamics has occurred in the past 35 years. Indeed, the Court's decisions in *Apodaca* and *Johnson* themselves spawned interest in research on factors affecting jury decision making. *See* Devine *et al.*, *supra*, at 623. The empirical studies conducted since *Apodaca* have cast doubt on the plurality's reasoning with regard to the purported functional equivalence of unanimous and non-unanimous juries.[4]

A. Empirical Research Has Shown That Juries Required to Act Unanimously are More Thorough than Non-Unanimous Juries

Studies comparing the quality of the deliberation of unanimous juries with non-unanimous juries have consistently found that non-unanimous juries are less thorough. *See* Reid Hastie, Steven D.

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interposed between himself and the officers of the State who prosecute and judge him is equally well served," 406 U.S. 411, the *Apodaca* Court relied on the conclusion of what was then the "most complete statistical study of jury behavior," *Id.* at n.5, indicating that "'the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it,'" *id.* (citing H. Kalven & H. Zeisel, The American Jury 461 (1966)).

[4] *See* Devine *et al.* 7 Psychol., Pub. Pol'y & L. at 669 (summarizing numerous studies); Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 227-233 (1983) (supporting unanimity in criminal trials); American Bar Ass'n, American Jury Project, *Principles for Juries and Jury Trials* 24, http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf (last accessed Dec. 21, 2010) (citing Devine *et al.*); Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 Nw. U.L. Rev. 201, 229-30 (2006) (questioning assumptions in *Apodaca* and related cases and recommending unanimous juries in civil cases).

Penrod & Nancy Pennington, *Inside the Jury*, 85 (1983) (finding that the farther the jury gets from a unanimity rule, the fewer key categories of evidence are discussed).[5] In addition, non-unanimous juries take fewer polls and take less time to reach a verdict than do unanimous juries. Devine *et al.*, *supra*, at 669 (summarizing several studies). *See also* Hastie, *et al.*, *supra*, at 76 (indicating that unanimous juries deliberate longer than non-unanimous juries, and that this result is consistent across all studies examining the decision rule). In addition, non-unanimous juries also tend to cease deliberations when the required quorum is reached. Devine *et al.*, *supra*, at 669.

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[5] The study examined the effects of the rule of decision on jury performance using an "experimental method employ[ing] an extremely realistic but highly controlled simulation of the jury decision task." Hastie *et al.*, *supra*, at 13. The study took place in actual courthouses, used existing court personnel, and used the actual jury pool as subjects. *Id.*

The Hastie study asked citizens called for jury duty in Massachusetts trial courts to participate in a mock *voir dire*, after which they were separated into 69 juries. Hastie *et al.*, *supra*, at 60. The jurors then watched a film of a three-hour reenactment of a murder trial. *Id.* at 46. After viewing the reenactment, the jury was instructed by a judge and then asked to retire to deliberate. *Id.* at 50-51. Before the start of deliberation, the jurors filled out a questionnaire asking which verdict they would choose if they had to decide at that time. *Id.* at 51. After deliberations, the jurors filled out post-deliberation surveys. *Id.* at 52-53. The 69 juries were separated into three groups of 23 juries each, divided by decision rule, with one group having reach a unanimous verdict, one group could reach a verdict if ten out of twelve jurors agreed, and the other group could reach a verdict if eight of twelve agreed. *Id.* at 59-60.

The idea that the limited deliberations of non-unanimous juries affect deliberation quality is reflected in the way jurors perceive the deliberations. Jurors serving on unanimous juries uniformly report being more satisfied with the deliberations and more confident that the jury came to the right verdict. Devine *et al.*, *supra*, at 669. *See also* Hastie, *et al.*, *supra*, at 82 (indicating that non-unanimous juries have lower rates of satisfaction with the quality of the deliberation and the validity of the verdict as compared with unanimous juries).[6] Non-unanimous juries also report lower ratings of the performance and decision processes of the other jurors. Hastie *et al.*, *supra*, at 76; Diamond, *et al.*, *supra*, at 205.

Perhaps the most important consideration in examining the effect of the decision rule is whether the rule of decision affects the outcome of deliberations. Studies have shown a limited, but significant, effect of the decision rule on the outcome of jury deliberations, though these effects depend on other factors such as the strength of the evidence. Devine *et al.*, *supra*, at 669. Accordingly, the rule of decision affects the outcome of jury deliberations in close cases—that is, those cases in which the prosecutor's case is neither particularly weak nor strong. *Id.*[7]

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[6] Jurors on-unanimous juries also report having a relatively negative view of their fellow jurors' open-mindedness and persuasiveness as compared with jurors on unanimous juries.

[7] Devine *et al.* also reviewed studies finding that whether the jury was unanimous had "little or no impact" on jury deliberations, but those studies had "methodological weaknesses, such as little or no variance in jury verdicts, . . . severe deliberation time limits, . . . and small samples." Devine *et al.*, *supra*, at 669.

Researchers have also studied how the decision rule affects verdict outcome. One element of the deliberative process that has been examined is the amount of deliberation that occurs in twelve-person juries after the majority faction reaches eight jurors. Hastie *et al.*, *supra*, at 95. In 10-2 quorum juries, 10% of the jury's total deliberation time takes place after the majority faction reaches eight jurors, as compared with 20% in unanimous juries. *Id.* at 95-96.[8] There is also evidence that this last 20-30 minutes of deliberation can be outcome determinative. In almost a third (seven) of the unanimous juries monitored in the Hastie *et al.* study, the verdict initially favored by the eight-juror majority was not the verdict delivered by the jury. *Id.* at 96.[9] In addition, almost 30% of the requests for information from the trial judge, a quarter of the corrections of the evidentiary or legal errors made during deliberation, and over one-third of the discussions of the reasonable doubt standard occurred during the period after an initial eight-juror majority had been established. *Id.*

Though the same number of juries under each of the three decision rules delivered the "correct" verdict of second-degree murder, *see* Hastie *et al.*, *supra*, at 59-60, the study yielded two significant results—a statistically significant increase in the

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[8] Non-unanimous juries also reach the eight-juror majority faster than do unanimous juries. Hastie *et al.*, *supra*, at 113.

[9] Three juries hung, and of the remaining four, two switched from second-degree murder to manslaughter and two switched, respectively, from first-degree murder and manslaughter to second-degree murder. *Id.* at 96.

number of hung juries under the unanimity rule, and a statistically significant number of "incorrect" first-degree murder verdicts under the 10-2 majority rule. *Id.* at 60.[10] The research suggests, then, that this result is somewhat normative; the hung juries under the unanimity rule seem to prevent the "wrong" result from occurring. *Id.* Also, when unanimous juries did come to the "wrong" result their verdicts were often less harsh than those delivered by non-unanimous juries which tended to deliver excessively harsh verdicts. *See id.* at 102.

Another factor that has been studied is the time taken between votes as a function of the decision rule. Unanimous juries took more time to deliberate between votes than did non-unanimous juries. Hastie *et al.*, *supra*, at 90. This greater length of time between votes is associated with the "integrative evidence-driven" deliberation style, while the shorter length of time between votes in the non-unanimous juries is attributed to the "discounting verdict-driven deliberation style." *Id.* *Accord* Diamond, *et al.*, *supra*, at 208. The evidence-driven deliberation style is adopted most often by juries in cases where the ultimate verdict was decided more by the deliberative process than by the positions of the jurors before deliberations began. Devine, *et al. supra*, at 701.

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[10] Though picking the "right" verdict is impossible, second-degree murder was considered the "right" verdict because it was the verdict delivered at the original trial, and legal experts who viewed the reenactment largely agreed that second-degree murder was the proper verdict. Hastie *et al.*, *supra*, at 62. The three hung juries under the unanimity rule would have also delivered the "wrong" verdict if the majority faction had prevailed. *Id.* at 63.

The decision rule has a demonstrated effect on the quality of deliberations and the way deliberations are perceived. Perhaps most importantly, the decision rule appears to have an effect on the accuracy of the delivered verdict. The research suggests that unanimous juries provide a normative advantage over non-unanimous juries.

B. Valid Minority Opinions Can Be Easily Marginalized when Unanimity is not Required

The *Johnson* majority concluded that changing the rule of decision would have little or no effect on the consideration given to the viewpoints of the minority jurors in a quorum jury and that the strength of the deliberations would not be significantly diluted. *Johnson v. Lousiana*, 406 U.S. 356, 361 (1972). The research contradicts this conclusion. Instead, the research indicates that eliminating unanimity reduces both the quality of juror deliberations and juror satisfaction with those deliberations. The research also indicates that while jurors extensively debate the issues in both unanimous and quorum juries, the jurors' knowledge that they do not have to resolve all disagreement to reach a verdict in quorum juries often leads to "dismissive" treatment of minority jurors whose votes are not needed to reach a verdict. Shari Seidman Diamond, *et al.*, *supra*, at 205. Indeed, one study found that juries with eventual holdouts were twice as likely to mention the quorum rule early in deliberations as were juries that ended up delivering a unanimous verdict, and in 40% of the juries studied, the jurors highlighted the quorum

requirement before or during the first vote. Diamond, *et al.*, *supra*, at 214.[11]

There is evidence to suggest that when deliberations are cut off prematurely based on majority reliance on the quorum rule, the reliability of the verdict suffers. In several cases, the result favored by the minority jurors was the same as the result favored by the judges in those cases. *See id.* at 222.[12] Evidence also suggests that unanimity is central to whether jury verdicts are seen to be legitimate. *See id.* at 227 (citing research indicating that "community residents viewed unanimous procedures for arriving at jury verdicts in criminal cases as more accurate and fairer than majority procedures").

As demonstrated above, application of the quorum rule raises concerns about the accuracy and perceived legitimacy of verdicts. Resort to the use of

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[11] The Shari Seidman Diamond study reviewed videos of the deliberations of 50 actual civil juries in Arizona. Diamond, *et al.*, *supra*, at 210-12. The 50 case sample contained 26 motor vehicle cases, 17 non-motor vehicle tort cases, 4 medical malpractice cases, and 3 contract cases. *Id.* at 211. Arizona civil juries consist of eight jurors, six of whom must agree in order to reach a verdict. *Id.* at 205. Thirty-three of the 50 juries reached unanimous verdicts on all claims, one case resulted in a hung jury, and the other 16 juries reached verdicts with at least one holdout. *Id.* at 212. Five of the 16 cases ended with a single holdout juror, while 11 of the cases either had two holdouts for one position (8), or two holdouts, each of whom had a different position (3).

[12] In the study, the judges presiding over the 50 reviewed cases filled out questionnaires in which they were asked to reveal what they thought to be the proper verdict after having heard the evidence. *Id.* at 222.

non-unanimous juries also raises concerns that the views of racial and ethnic minorities and women may be marginalized. Though the Court has proscribed exclusion of people of color, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), and women, *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), from juries, research indicates that a quorum decision rule may contribute to a *de facto* exclusion of their viewpoints. Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1264 (Apr. 2000). The data indicate that women and minorities are underrepresented on juries. *Id.* at 1276-77, 1298 (citing evidence that women and people of color are underrepresented in the venire and on juries, and that prosecutors disproportionately use peremptory strikes on people of color, despite the prohibitions of *Batson v. Kentucky*, 476 U.S. 79 (1986)). It also cannot be ignored that, as the Petitioner documents extensively, Pet. at 33-34, the Louisiana Constitutional provision permitting non-unanimous juries was adopted as part of the 1898 Louisiana Constitutional convention—the same convention that adopted various Jim Crow provisions specifically intended to limit African American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." *See* Constitutional Convention of the State of Louisiana, Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 380-81 (H.J. Hearsey, 1898).[13]

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[13] When discussing the provisions adopted to prevent African American suffrage, one delegate to the convention stated as follows:

> the Supreme Court of the United States in the Wilson case, referring to that, said that they had

While the underrepresentation of women and people of color on juries is no guarantee that they will end up in the minority faction of a quorum jury, *see* Hastie *et al.*, *supra*, at 149; Diamond, *et al.*, *supra*, at 220 (finding that there are no personal demographic characteristics that differentiate holdouts from the other jurors), there are indications in the data that suggest that *de facto* exclusion of underrepresented groups is an important concern. For example, race and gender are negatively correlated with juror persuasiveness and deliberation performance. *See* Hastie *et al.*, *supra*, at 149 (finding that to the extent the juror has characteristics or experiences that are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout). *See also* Taylor-Thompson, *supra*, at 1299-1300 (citing studies observing that women speak less than do men during deliberations, and that men often interrupt women and ignore their arguments). These factors indicate an increased likelihood that women and people of color may end up being outvoted by the majority on a non-unanimous jury.

> swept the field of expedients, but they were permissible expedients, and that is what we have done in order to keep the negro from exercising the suffrage. What care I whether the test we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (Applause)

Constitutional Convention of the State of Louisiana, *supra*, at 380.

Any marginalization of women and people of color from juries created by a quorum rule of decision may have collateral consequences for racial and ethnic minority defendants and crime victims. For example, a 1996 study found that when the prosecutor's evidence was weak, majority white juries were more likely to convict black defendants than were majority black juries. Devine *et al.*, *supra*, at 673-74. In addition, the verdicts of the majority white juries were harsher than those of the majority black juries. *Id.* Other studies have found that majority white juries are similarly punitive when the defendant is Latino. Taylor-Thompson, *supra*, at 1293 (citing Dolores A. Perez, *et al.*, *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. Applied Soc. Psychol., 1249, 1249 (1993)). In addition, interviews conducted with 360 actual jurors for rape trials in Indianapolis revealed that the mostly middle-class white jurors tended to disbelieve African American rape complainants. Taylor-Thompson, *supra*, at 1294 (citing Gary D. LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault*, 155-55, 200-01 (1989).

In *Ballew v. Georgia*, 435 U.S. 223, 236-37 (1978), the Court stated that "meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.'" *Id.* (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)). In addition, part of the Court's rationale in examining the role of jury size on verdict

outcome was to minimize "imbalance[s] to the detriment of one side, the defense." *Ballew*, 435 U.S. at 236. The Court has also made significant efforts in recent years to ensure that jurors are not excluded from jury participation on the basis of their race or gender. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994); *Medellin v. Dretke*, 544 U.S. 660 (2005) and *Snyder v. Louisiana.*, 552 U.S. 472 (2008). The evidence suggests that to the extent the views of women and people of color are marginalized within them, non-unanimous juries undermine these important constitutional principles.

C. The Myth of the Eccentric Holdout Juror

One argument often made in favor of dispensing with the traditional unanimity requirement is that the unanimity rule allows an eccentric holdout juror to subvert the will of a principled majority. *See* Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The behavior of the non-unanimous civil jury*, 100 Nw. U.L. Rev. 201, 204 (2006) (citing critics of unanimity who claim that quorum juries protect the jury from the "obstinacy of the erratic or otherwise unreasonable holdout juror"); James Kachmar, Comment, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 Pac. L.J. 273, 299 (1997) (citing cases in which a single holdout juror irrationally hung a criminal jury). The research shows that this concern is unfounded. Diamond, *et al.*, *supra*, at 205 (finding no evidence that outvoted holdouts are irrational or eccentric in ways that justify isolating them or failing to seriously consider their views).

To begin with, juries rarely hang. Numerous studies indicate that 90% of the time, the jury's final verdict was that favored by the majority of the jury at the outset of deliberation. Devine *et al.*, supra, at 690. This result appears to be linked to the size of the majority at the beginning of deliberations—majorities of two-thirds or more usually prevail, while weak majorities are more likely to hang (or acquit, presuming that the original majority was to convict). *Id.* at 691

In addition, initial two-thirds majorities favoring conviction succeeded in obtaining a guilty verdict 67% of the time, while two-thirds majorities favoring acquittal won 94% of the time. *Id.* The largest increase in success rate for conviction majorities occurs, in 12-person juries, between 10-2 and 11-1, whereas the success rate for acquittal majorities increases the most between 8-4 and 9-3. *Id.* at 692.[14] The data indicate that if seven or fewer jurors favor conviction at the beginning of deliberation, the jury will probably acquit. If ten or more jurors favor conviction, the jury will probably convict. At eight or nine jurors supporting conviction, the outcome becomes more difficult to predict. *Id.* In any event, it is clear that not only are hung juries rare, the 11-1 hung jury is even rarer. Indeed, contrary to the common stereotype of the jury stymied by a lone holdout, studies have shown that juries are usually hung either by two large factions or

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[14] If hung juries are factored out of the analysis, the greatest increase in success rate for conviction majorities is between 8-4 and 9-3; for acquittal, a majority is not even necessary, as the greatest increase in success rate occurs when the acquittal faction is greater than four. Devine *et al.*, *supra*, at 692.

several smaller factions. Hastie *et al.*, supra, at 166. *See also* Diamond, *et al.*, *supra*, at 207 (citing findings from the National Center of State Courts finding that 58% of hung juries in criminal cases ended with at least three holdouts).

In addition to hung juries being unlikely, the research shows that the fears of the irrational holdout juror are unfounded. Indeed, there are no personal demographic characteristics that differentiate holdouts from the other jurors. Hastie *et al.*, *supra*, at 149; Diamond, *et al.*, *supra*, at 220. Further, the holdouts viewed the judge's instructions in much the same way as the majority jurors, and their recall of the testimony and of the elements of the offenses did not differ from that of the majority. Hastie *et al.*, *supra*, at 149. *See also* Diamond, *et al.*, *supra*, at 220 (finding that holdouts and majority jurors largely agreed about the content of the evidence).

Other than extreme disagreement with the majority's choice of verdict, the main difference between the holdouts and the majority was that the holdouts had a significantly lower perception of the seriousness and thoroughness of the deliberations. Hastie *et al.*, *supra*, at 149; Diamond, *et al.*, *supra*, at 225. This negative perception appears to be linked to deliberation performance, which is, in turn, linked to education, occupation, income, gender, and juror persuasiveness. Hastie *et al.*, *supra*, at 149. The more a juror's characteristics or experiences are negatively linked to deliberation performance and

juror persuasiveness, the more likely the juror is to be a holdout. *See id.*[15]

To summarize, a perceived cost of unanimity is the slight increase in hung juries that results from the rule. The data ameliorate this concern. In contrast, the data indicate the cost associated with the marginalization of the minority voice that is attendant to the quorum rule is the cost that should be eliminated. This problem becomes even more acute when the marginalized minority is composed of individuals from underrepresented groups.

D. The Court's Decisions In *Apodaca* and *Johnson* Undermine A Critical Portion of the Jury Trial Guarantee And Make This Court's Intervention Imperative

There can be no serious question that when the Framers adopted the jury trial guarantee, they did so with a *unanimous* jury in mind. *See Booker v. United States*, 543 U.S. 220, 238-39 (2005); *Apprendi v New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J. concurring). At the time when *Apodaca* and *Johnson* were decided, the importance of this time-honored procedural mechanism may not have been apparent to the Court. In light of a generation of empirical research, however, the importance of the unanimity requirement is now undeniable. Unanimous juries protect the quality and integrity of the verdict, ensure full participation of all jurors, and prevent marginalization of the views of underrepresented groups. Non-unanimous juries, as a practical matter,

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[15] Even when there was a lone holdout, that person was likely to be a person who refused to participate in the deliberations. Hastie *et al.*, *supra*, at 166.

constitute a very different deliberative body than the one the Framers of the Sixth Amendment had in mind. *Amicus Curiae* respectfully requests that the Court grant the Petition in order to address whether the *Apodaca* and *Johnson* Courts properly interpreted the Sixth Amendment jury trial guarantee to permit non-unanimous juries, unknown at the time of the Founding.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court of the United States

TROY BARBOUR,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to
the Louisiana Court of Appeal, Fourth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct.[1] Founded in 1958, NACDL has a membership of more than 11,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. The issues raised in this case are especially important, as they implicate not only the essential right to a trial by jury, but also the more general principle that a criminal defendant should receive the same constitutional protections in state court as in federal court.

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amicus*'s intention to file this brief.

Introduction

Every year, thousands of defendants in Louisiana and Oregon face the prospect of imprisonment—including for life—as a result of a conviction by a jury whose verdict is not unanimous. In many instances, these defendants are convicted and imprisoned even though one or more jurors had a reasonable doubt about their guilt. Because this practice is common and its implications for the fair administration of justice are profound, the Court should review this case and revisit its decision in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), in which the Court held that the Sixth Amendment does not entitle criminal defendants to a unanimous jury verdict in state court.

First, the decision in *Apodaca* continues to affect substantial numbers of cases. In Louisiana and Oregon, divided convictions occur with surprising frequency, including in many cases in which the defendant faces decades (or more) in prison as a result. The prospect of a divided verdict also affects virtually all plea negotiations in these two states, as defendants know that if they exercise their right to a trial, they could be convicted even if the state cannot convince the full jury of their guilt. Even outside Louisiana and Oregon, moreover, *Apodaca* has prevented courts from redressing faulty instructions and irregular deliberations that produced non-unanimous convictions.

Second, the lower threshold for conviction has resulted in a greater risk of error and unfairness. Divided verdicts have followed abbreviated delibera-

tions, even in the most serious cases. And they have amplified the risk of convictions based on insufficient evidence or tainted by inadmissible testimony or racially discriminatory peremptory strikes. This case highlights these concerns; because the verdict was not supported by any physical evidence, and the credibility of the alleged victim was questionable at best, this case presents an excellent vehicle for the Court to revisit *Apodaca*.

"The primary purpose of the jury in our legal system is to stand between the accused and the powers of the State." *Lewis* v. *United States*, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring). Because the continued use of non-unanimous verdicts weakens this critical safeguard, the Court should grant the petition for certiorari and extend the full protections of the Sixth Amendment to defendants in all states.

Reasons for Granting the Petition

I. Non-Unanimous Verdicts Significantly Undermine The Administration Of Criminal Justice.

Although only Louisiana and Oregon currently permit non-unanimous verdicts in felony criminal cases, the practice continues to have a significant effect, both in those two states and elsewhere. Convictions by non-unanimous juries in Louisiana and Oregon are common and recurring, and defendants in other states have been denied relief from errors that have produced or may have produced non-unanimous verdicts.

First, since the Court last declined to consider whether a non-unanimous conviction violates a defendant's Sixth Amendment rights, in *Bowen* v. *Oregon*, 130 S. Ct. 52 (2009), at least two dozen defendants have been convicted by non-unanimous juries; more than eighty such convictions have occurred over the past five years.[2]

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[2] In the last two years alone, defendants were convicted by non-unanimous verdicts in *State* v. *Lawrence*, __ So. 3d __, 2010 WL 3385302, at *1 (La. Ct. App. Aug. 25, 2010); *State* v. *Garner*, __ So. 3d __, 2010 WL 3239039, at *2 (La. Ct. App. Aug. 18, 2010); *State* v. *Blow* 46 So. 3d 735, 751 (La. Ct. App. 2010); *State* v. *White*, 44 So. 3d 309, 313–14 (La. Ct. App. 2010); *State* v. *Moody*, 38 So. 3d 451, 455 (La. Ct. App. 2010); *State* v. *Every*, 35 So. 3d 410, 420 (La. Ct. App. 2010); *State* v. *Lomax*, 35 So. 3d 396, 403 (La. Ct. App. 2010); *State* v. *Sumrall*, 34 So. 3d 977, 990–91 (La. Ct. App. 2010); *State* v. *Samuels*, No. 2010 KA 0821, 2010 WL 4272863, at *6–7 (La. Ct. App. Oct. 29, 2010); *State* v. *Blanchard*, No. 2010 KA 0014, 2010 WL 2696998, at *8 (La. Ct. App. July 8, 2010); *State* v. *Jones*, No. 2009 KA 2261, 2010 WL 1838309, at *2–3 (La. Ct. App. May 7, 2010); *State* v. *Jones*, 29 So. 3d 533, 540–41 (La. Ct. App. 2009); *State* v. *Taylor*, 21 So. 3d 421, 425–26 (La. Ct. App. 2009); *State* v. *Smith*, 20 So. 3d 501, 505–08 (La. Ct. App. 2009); *State* v. *Raymond*, 13 So. 3d 577, 592–93 (La. Ct. App. 2009); *State* v. *Tillman*, 7 So. 3d 65, 77–78 (La. Ct. App. 2009); *State* v. *Martin*, No. 2009 KA 1368, 2009 WL 4981320, at *1 (La. Ct. App. Dec. 23, 2009); *State* v. *Cordova-Contreras*, 2010 WL 4867534, at *1 (Or. Ct. App. Dec. 1, 2010); *State* v. *Fish*, __ P.3d __, 2010 WL 4746157, at *1 (Or. Ct. App. Nov. 24, 2010); *State* v. *Hartman*, __ P.3d. __, 2010 WL 4629459, at *1 n.1 (Or. Ct. App. Nov. 17, 2010); *State* v. *Cole*, 242 P.3d 734, 735 (Or. Ct. App. 2010); *State* v. *Sanchez*, 242 P.3d 692, 693 (Or. Ct. App. 2010); *State* v. *Bainbridge*, 241 P.3d. 1186, 1187 (Or. Ct. App. 2010); *Oregon* v. *Claborn*, 240 P.3d 66, 66–67 (Or. Ct. App. 2010); *State* v. *Banks*, 234 P.3d 1084, 1085 (Or. Ct. App. 2010); *State* v. *Eilers*, 232 P.3d 997, 997 (Or. Ct. App. 2010); *State* v. *Ivory*, 220 P.3d 56, 56

Moreover, these figures almost certainly understate the actual number of convictions by non-unanimous juries, because they do not account for cases in which jurors were not polled or those in which verdicts were not appealed and reported in decisions by appellate courts. Oregon arrests over 150,000 individuals each year (excluding those arrested in traffic offenses), *see* Statewide Statistics Relating to Criminal Offenses and Arrests for 2007 1-4, http://www.oregon.gov/OSP/CJIS/docs/2007/SECTION_1_STATEWIDE_SUMMARY_2007.pdf, and a study performed by the Oregon Office of Public Defense Services estimated that up to two-thirds of Oregon criminal cases involve a non-unanimous verdict on at least one count, *see* Oregon Office of Public Defense Services, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Database Services Commission* 4 (May 21, 2009), http://www.ojd.state.or.us/osca/opds/Reports/documents/PDSCReportNonUnanJuries.pdf. Even if the verdict were unanimous in every case in which the jury was not polled, "non-unanimity would still be present in over 40% of all felony jury verdicts." *Id.* at 5.

Likewise, in Louisiana, there are over 200,000 crimes per year. Louisiana Uniform Crime Reporting Program, *Crime in Louisiana 2007* 20 (May 1, 2009),

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(Or. Ct. App. 2009); *State* v. *Navarrete-Pech*, 213 P.3d 1262, 1265 (Or. Ct. App. 2009); *State* v. *Lavadores*, 214 P.3d 86, 88 n.1 (Or. Ct. App. 2009); *State* v. *Camacho-Alvarez*, 200 P.3d 613, 614 (Or. Ct. App. 2009).

http://lcle.louisiana.gov/programs/uploads/crime_in_la_2007.pdf. If even a small percentage of these crimes lead to trials that produce non-unanimous verdicts, the number of such verdicts could reach into the thousands.[3]

Second, defendants found guilty by non-unanimous juries often receive harsh sentences—including life in prison. In considering Louisiana's rules governing jury unanimity, this Court observed that the state legislature "obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment." *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972). But Louisiana now permits non-unanimous juries to convict defendants of second-degree murder, which carries a mandatory sentence of life imprisonment without the possibility of parole. *See* La. Rev. Stat. § 14:30.1(B).

Indeed, at least four Louisiana defendants received mandatory life sentences in the past five years when at least one juror voted to acquit. *See State* v. *Sumrall*, 34 So. 3d 977, 978, 980–81, 987 (La. Ct. App. 2010); *State* v. *Williams*, 950 So. 2d 126, 128–29

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[3] Federal courts reviewing habeas petitions brought by defendants from Louisiana and Oregon must routinely affirm non-unanimous convictions as well. *See, e.g.*, *Wells* v. *Howton*, No. 09-35963, 2010 WL 4487128, at *1 (9th Cir. Nov. 9, 2010); *Remme* v. *Hill*, 370 Fed. App'x 855, 856 (9th Cir. 2010); *Divers* v. *Warden, La. St. Penitentiary*, No. 07-2030, 2010 WL 4291330, at *1, *13 (W.D. La. Aug. 17, 2010); *Reedy* v. *Hill*, Civ. No. 04-545, 2008 WL 441690, at *6 (D. Or. Feb. 13, 2008), *aff'd*, 383 Fed. App'x 689 (9th Cir. 2010); *Watson* v. *Cain*, No. 06-613, 2007 WL 1455978, at *8 (E.D. La. May 17, 2007).

(La. Ct. App. 2007); *State* v. *Chandler*, 939 So. 2d 574, 576 (La. Ct. App. 2006); *State* v. *Davis*, 935 So. 2d 763, 765-66 (La. Ct. App. 2006). Two others received life sentences at trial but had their convictions reversed on other grounds on appeal. *State* v. *Brown*, 943 So. 2d 614, 615 (La. Ct. App. 2006); *State* v. *Christian*, 924 So. 2d 266, 266 (La. Ct. App. 2006). Even defendants convicted of lesser crimes by non-unanimous juries have been sentenced to decades-long imprisonment. *See, e.g.*, *State* v. *Moody*, 38 So. 3d 451, 453, 455 (La. Ct. App. 2010) (60 years for aggravated burglary); *State* v. *Every*, 35 So. 3d 410, 413–14, 420 n.10 (La. Ct. App. 2010) (60 years for drug offenses).

Third, the specific regime governing non-unanimous verdicts in Louisiana encourages prosecutors to manipulate charging decisions to ease their burden of obtaining a conviction in murder cases. A conviction for first-degree murder requires a unanimous verdict. *See* La. Rev. Stat. § 14:30(C); La. C. Cr. P. Art. 782(A). A conviction for second-degree murder does not. Although a defendant convicted of second-degree murder is ineligible for the death penalty, the defendant still faces a mandatory sentence of life imprisonment without the possibility of parole. In *State* v. *Raymond*, 13 So. 3d 577 (La. Ct. App. 2009), the prosecution amended a first-degree murder charge to one for second-degree murder on the day of trial—nearly four years after the defendant pleaded not guilty to the original charge. *Id.* at 580–81. The defendant was ultimately convicted by a vote of 11–1. *Id.* at 592. Likewise, in *State* v. *Williams*, 901 So. 2d 1171 (La. Ct. App. 2005), the state amended the

charge from first-degree murder to second-degree murder the day before trial—two years after the defendant's original not-guilty plea. *Id.* at 1172. The defendant was ultimately convicted by a vote of 10–2. *See id.* at 1177.

Fourth, *Apodaca* affects even cases that do not actually result in divided verdicts. As in other contexts, a rule about jury decisions "affect[s] every case": "It would affect decisions about whether to go to trial. It would affect the content of plea negotiations." *United States* v. *Booker*, 543 U.S. 220, 248 (2005). The ability to obtain a conviction by a non-unanimous verdict gives the prosecution additional leverage that unfairly harms all defendants in Louisiana and Oregon.

Finally, *Apodaca* has compelled federal courts to reject habeas claims that challenge potentially non-unanimous verdicts from states other than Louisiana and Oregon. *See, e.g.*, *Moore* v. *Clark*, No. 2:07-cv-423, 2010 WL 3125979, at *7 (E.D. Cal. Aug. 6, 2010) (denying relief even though trial court's unanimity instruction was "limited inexplicably" to only certain counts).[4] For instance, a federal court reviewing a

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[4] *See also, e.g.*, *Barreto* v. *Martel*, No. C 08-2008, 2010 WL 546586, at *12–13 (N.D. Cal. Feb. 10, 2010) ("Since a criminal defendant in a state prosecution is not entitled to a unanimous verdict at all under the federal Constitution, the state court's determination that an instruction on jury unanimity was unnecessary under state law in the circumstances of the case cannot possibly be considered a violation of federal due process."); *Sullivan* v. *Kernan*, No. Civ. S-02-1148, 2009 WL 2985494, at *6 (E.D. Cal. Sept. 16, 2009) (relying on *Apodaca* to reject claim that jury instruction violated right to unanimous jury

criminal conviction and 35-year sentence from Texas state court was forced to deny habeas relief even though a juror averred that she had been absent during the final vote. *See Washington* v. *Quarterman*, No. 3:05-CV-1932-N ECF, 2007 WL 869015, at *1–2 (N.D. Tex. March 22, 2007). Citing *Apodaca*, the court explained that "neither the United States Constitution nor any law of the United States mandate a unanimous verdict in a State criminal action." *Id.* at *13.

In sum, the decision in *Apodaca* has permitted scores of defendants in both Louisiana and Oregon to be convicted by non-unanimous juries and imprisoned for decades or even life. It has also affected defendants in other states, who lack recourse to habeas corpus even if irregularities taint jury deliberations or otherwise produce divided verdicts. These troubling and recurring consequences warrant the Court's review.

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verdict); *Acosta* v. *N.H. State Prison*, No. 07-cv-181-PB, 2007 WL 2790734, at *4 (D.N.H. Sept. 25, 2007) (rejecting argument challenging non-unanimous verdict on one count because it "fails to identify any federal claim"); *cf. Berry* v. *Grigas*, 171 Fed. App'x 188, 189–90 (9th Cir. 2006) (*Apodaca* foreclosed claim of petitioner, convicted by a vote of 11–1 in Nevada state court, that counsel was ineffective for advising him to accept a non-unanimous verdict in exchange for the prosecutor's promise to forego the death penalty); *Lanza* v. *Sec'y, Dep't of Corr.*, No. 8:06-cv-380-T-30MSS, 2008 WL 3889628, at *7 (M.D. Fla. Aug. 20, 2008) (same).

II. Rules Permitting Non-Unanimous Verdicts Have Increased the Risk of Error and Unfairness.

Recent experience in Oregon and Louisiana also confirms that non-unanimous juries jeopardize the quality and accuracy of jury decisionmaking in criminal cases.

A. Abbreviated Deliberations, Even For Serious Charges.

As detailed in an amicus brief submitted to the Court in *Lee* v. *Louisiana*, non-unanimous verdicts produce deliberations that are shorter, less thorough, and less careful. *See* Brief for the Houston Institute of Race & Justice as Amicus Curiae Supporting Petitioner, *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1523), 2008 WL 2682524, at *6–10. Experience in Louisiana and Oregon has highlighted this problem, which occurs even where the evidence is complex and the consequences are severe.

In *State* v. *Sumrall*, for instance, the Louisiana defendant appealed his conviction for second degree murder in a case that turned on a credibility battle between the defendant and the chief prosecution witness. *See* 34 So. 3d at 988. Although the trial featured "lengthy and detailed testimony from both of them," *id.*, the jury reported itself deadlocked after just a little over three hours, *id.* at 992. The jury then reached a 10–2 verdict after the trial judge assured the jury that it was close to "the ten you need to reach a verdict" and instructed it to continue. *Id.* *See also, e.g.*, *State* v. *Blow*, 46 So. 3d 735, 751 (La.

Ct. App. 2010) (upholding 10–2 conviction for murder solicitation resulting from less than two hours of deliberation); *State* v. *Dabney*, 908 So. 2d 60, 63–65, 68 (La. Ct. App. 2005) (reversing 10–2 armed-robbery conviction resulting from less than four hours of deliberation).

Although published decisions in Oregon rarely detail the amount of time spent reaching divided verdicts, deliberations in that state appear to be abridged as well. Members of the Oregon defense bar, in fact, have observed that if "*Twelve Angry Men* had been filmed here, it would have been a much shorter film." Brief for The Federal Public Defender for the District Court of Oregon as Amicus Curiae Supporting Petitioner, *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117), 2009 WL 1526929, at *17.

In some cases, the fact that unanimity is not required has led to confusion regarding whether ten jurors have even reached a verdict, further demonstrating the inadequacy of deliberations. In *State* v. *Jones*, 2009 KA 2261, 2010 WL 1838309 (La. Ct. App. May 7, 2010), for example, the trial court recorded convictions on both counts as resulting from 10–2 votes, but review of the record indicated that only nine jurors had voted to convict on one count, as one juror had "changed both of her 'guilty' votes to 'not guilty' votes" during the second poll. *Id.* at *2.

An especially bizarre example from Oregon is *Fischer* v. *Hill*, No. CV. 06-1625-MA, 2009 WL 87603 (D. Or. Jan. 12, 2009). The defendant was indicted for attempted murder and three counts of assault. Initially, the jury reported that it had found the de-

fendant not guilty on Count 1, attempted murder, and Count 2, first degree assault, and guilty on Counts 3 and 4, second-degree assault. *See id.* at *1. Yet when the jury was polled, the respective votes were 11–1 to acquit on Count 1, only 7–5 to acquit on Count 2, 11–1 to convict on Count 3, and 11–1 to convict on Count 4. *See id.* In a subsequent poll, to clarify whether the jury had enough votes to acquit on Count 2, the respective votes were 10–2 to acquit on Count 1, 6–6 on Count 2, 8–4 to convict on Count 3, and 11–1 to convict on Count 4. *See id.* at *2. The jury's position changed further after additional deliberations: it returned the next day with 11-1 guilty verdicts on both Counts 2 and 3. *See id.* at *3. Such confusion and shifting positions would be unlikely if Oregon required unanimity.

B. Magnified Risk of Prejudicial Error.

When the jury need not be unanimous, the risks and costs of error are magnified. Defendants that might have faced a hung jury notwithstanding trial errors instead face a greater risk of conviction.

Verdicts based on insufficient evidence. Non-unanimous verdicts increase the risk of convictions based on insufficient evidence. *See, e.g.*, *State* v. *Johnson*, 948 So. 2d 1229, 1238 (La. Ct. App. 2007) (non-unanimous jury "abused its vast discretion in finding that defendant committed second degree murder"); *State* v. *Houston*, 925 So. 2d 690, 698 (La. Ct. App. 2006) (non-unanimous conviction for child molestation based on insufficient evidence). Although even unanimous juries sometimes convict based on insufficient evidence, the possibility of a non-

unanimous verdict ensures that dissenting voices will receive less consideration and weaknesses in the state's proof less scrutiny.

Even where the evidence may have been sufficient as a matter of law, a non-unanimous verdict resulting from sharply conflicting evidence raises serious concerns about the strength of the state's case. In *State* v. *Brantley*, 975 So. 2d 849 (La. Ct. App. 2008), the defendant was convicted of attempted unlawful possession of a firearm, by a 10–2 vote. The appellate court acknowledged the lack of any eyewitnesses, forensic evidence, or anything beyond mere circumstance connecting the defendant with the gun, and noted several facts linking the firearm to other parties. *See id.* at 852. Yet the majority upheld the verdict, *id.*, notwithstanding the dissent's warning that the verdict should be overturned because the "state's circumstantial evidence gives rise to competing inferences" and "[t]he state presented no evidence that defendant exercised actual possession of the gun." *Id.* at 853 (Caraway, J., dissenting). Other non-unanimous convictions have been upheld even though they hung from similarly slender threads.[5]

This case too presents a vivid example of a non-unanimous verdict based on slim evidence, and thus presents an excellent vehicle for addressing the con-

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[5] *See, e.g.*, *State* v. *Mack*, 981 So. 2d 185, 186, 190 (La. Ct. App. 2008) (affirming 11–1 conviction for second degree murder and mandatory life sentence even though critical eyewitness "might have been less than forthcoming"); *State* v. *Gullette*, 975 So. 2d 753, 760 (La. Ct. App. 2008) (affirming 11–1 aggravated rape conviction in a "classic case of 'he said, she said'").

stitutional issues surrounding non-unanimous juries. Here, the alleged victim lied to police about a number of details on the evening in question and was under the influence of cocaine at the time of the events; his testimony, moreover, was not corroborated by any physical evidence. Pet. at 3. The 10–2 verdict in this case, resulting from a credibility battle and featuring an alleged victim of dubious character, highlights the concerns that make jury unanimity so important.

Introduction of inadmissible and prejudicial evidence. When the jury verdict need not be unanimous, it is also harder to undo the taint from the introduction of evidence that is inadmissible and unduly prejudicial. *See, e.g., State* v. *Fish*, __ P.3d __, 2010 WL 4746157, at *6 (Or. Ct. App. Nov. 24, 2010) (reversing non-unanimous conviction for second degree murder where trial court admitted prejudicial statement with little probative value that "easily could have been misused by the jury"). Oregon courts, for instance, have reversed a series of child sex abuse convictions unsupported by physical evidence and that appeared to rest primarily upon an expert witness's impermissible vouching for the child's credibility.[6] As the appellate court recognized in *Simpson* v. *Coursey*, 197 P.3d 68 (Or. Ct. App. 2008), the non-unanimous vote made "the possibility that [im-

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[6] *See, e.g., Bainbridge*, 241 P.3d 1186 (reversing 11–1 conviction where expert vouched for victim's honesty); *Cordova-Contreras*, 2010 WL 4867534 (reversing non-unanimous verdict after trial court permitted doctor to vouch for child's credibility in sexual abuse case).

proper] testimony vouching for the credibility of the victim affected the verdict . . . very real." *Id.* at 73. Although appellate review will sometimes correct these errors, there are inevitably cases in which such errors go uncorrected—making it important to adopt rules that prevent them in the first place.

Racially Motivated Peremptory Challenges. The permissibility of non-unanimous convictions also increases the risk of undetected *Batson* violations. When prosecutors need not convince the full jury, they may exercise race-based peremptory challenges more selectively, counting on the supermajority to render irrelevant the views of jurors who are racial minorities. *See, e.g.*, *State* v. *Elie*, 936 So. 2d 791, 794, 797–801 (La. 2006) (affirming an 11–1 manslaughter conviction after the state exercised peremptory challenges against eight African-American jurors, leaving a jury with only two African-Americans, one of whom was an alternate).

With shorter deliberations and less scrutiny of the state's evidence and tactics, the margin for error is slim when the state need not convince the entire jury of the defendant's guilt. Because cases presenting these concerns are numerous and recurring, the constitutionality of divided criminal verdicts and the correctness of *Apodoca* warrant the Court's reconsideration.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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